87-1864

No. _____

Supreme Court, U.S.
FILED
MAY 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLEVELAND NEWSPAPER GUILD, LOCAL 1,
THE NEWSPAPER GUILD, et al.,

Petitioners,

—vs—

PLAIN DEALER PUBLISHING COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the dismissal on the ground of laches of an action brought by private parties pursuant to Title VII of the Civil Rights Act of 1964, as amended, is permitted and is consistent with the holding of this Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), and the teaching of Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), where suit was commenced within the period permitted by the Act following issuance of a notice of right-to-sue by the EEOC but where those individuals awaited completion by the EEOC of the administrative process and where there is no showing that the individuals caused a delay in the administrative process; a question about which there are at least three distinct and conflicting approaches among the circuit courts of appeal: the Fourth, Fifth, Ninth, Eleventh, and D.C.

Circuits; the Sixth, Seventh and Eighth Circuits; and the Third Circuit?

2. Whether it is consistent with the policies underlying Title VII of the Civil Rights Act of 1964, as amended, and with the teaching of Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), and of EEOC v. Shell Oil Co., 466 U.S. 54 (1984), to permit a dismissal on the ground of laches of an action brought by private individuals, pursuant to Title VII of the Civil Rights Act of 1964, as amended, where a significant part of the delay occasioned during the administrative process was caused by tactics of the defendant employer and/or where the prejudice claimed by the defendant was caused in whole or in considerable degree by the defendant employer's unreasonable inaction or indifference to the pending

charge of continuing discrimination which was filed with the EEOC?

3. Whether it is consistent with the holding of this Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to permit a dismissal on the ground of laches, as opposed to some other form of relief, of a lawsuit alleging a continuing pattern and practice of discrimination, up to and including the date of filing of the lawsuit, where the lawsuit is brought, pursuant to Title VII of the Civil Rights Act of 1964, as amended, by individuals who awaited completion by the EEOC of the administrative process required by the statute and where there is no evidence that the individuals intentionally delayed the administrative process?

Parties To The Proceeding Before The United States Court Of Appeals For The Sixth Circuit

Plaintiffs:

The Cleveland Newspaper Guild, Local 1 of The Newspaper Guild, AFL-CIO, CLC;

Ms. Cynthia Reece, Cleveland, Ohio;

Ms. C. Victoria Fleming, Nova, Ohio;

Ms. Alma Kaufman, Cleveland Heights, Ohio;

Ms. Nancy Barnhouse, Cleveland, Ohio;

Ms. Judith K. Sammon, Shaker Heights, Ohio.

Defendant:

The Plain Dealer Publishing Company, Cleveland, Ohio

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

CLEVELAND NEWSPAPER GUILD,
LOCAL 1, TNG, et al.,

Petitioners,

-vs-

PLAIN DEALER PUBLISHING COMPANY,

Respondent

Petitioners respectfully pray that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the en banc judgment of that court.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Sixth Circuit is reported at 839 F.2d 1147 and is set forth in the Appendix at A-1 through A-34. The panel opinion of the United States Court of Appeals for the

Sixth Circuit[1/] is reported at 813 F.2d 101 and is set forth in the Appendix at A35 through A-42. The unreported opinion of the United States District Court for the Northern District of Ohio, Eastern Division is set forth in the Appendix at A-43 through A-58.

JURISDICTION

The en banc opinion and judgment of the United States Court of Appeals for the Sixth Circuit were entered on February 11, 1988.

This petition seeks review of the judgment of a United States Court of Appeals in a civil case involving Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. This

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1/ Purusant to Rule 14(A) of the Rules of the United States Court of Appeals for the Sixth Circuit, upon the grant of a petition for rehearing, en banc, the panel decision is vacated.

Court has jurisdiction to grant this petition pursuant to 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.; more specifically, 42 U.S.C. §§ 2000e-5 through 2000e-8, pertinent parts of which are set forth in the Appendix at A-61 through A-74. A federal regulation involved in this petition, C.F.R. § 1602.14, as filed February 16, 1966 and as amended December 31, 1981, is set forth in the Appendix at A-84 through A-86 and A-81 through A-83, respectively.

STATEMENT OF THE CASE

Nature of the Case

This is a sex discrimination case brought pursuant to Title VII of the

Civil Rights Act of 1964, as amended; specifically, 42 U.S.C. § 2000e-5(f)(1).

The Cleveland Newspaper Guild, Local No. 1, The Newspaper Guild, AFL-CIO, CLC (hereinafter "the Guild"), and Cynthia Reece, C. Victoria Fleming, Alma Kaufman, Nancy Barnhouse and Judith K. Sammon, commenced this case against appellee, The Plain Dealer Publishing Company (hereinafter, "The Plain Dealer," "the defendant" or "the Employer") in the United States District Court for the Northern District of Ohio, Eastern Division (Civil Action No. C-82-2128).

The complaint set forth a class action brought by plaintiffs for themselves and other women similarly situated. The Guild avered that it was a labor organization and the collective bargaining representative of certain identified classes of employees of The Plain Dealer, and that each individual

plaintiff either was at that time or had previously been in the employ of The Plain Dealer.

The complaint further alleged at paragraph 14 that The Plain Dealer intentionally engaged in unlawful employment practices in that it had "[s]ince April 12, 1972, and continuously up to the present time...engaged in unlawful employment practices" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., against women who had applied for employment and those women who were and had been in defendant's employ.

The Course of Proceedings In The District Court

Plaintiffs' complaint, alleging a continuous course of sex-based discrimination was filed on August 18, 1982. The Plain Dealer filed its answer to the

complaint on October 21, 1982, in which it stated, as its "third defense," that the complaint was "barred by the doctrine of laches." Thereafter, on July 29, 1983, The Plain Dealer moved for summary judgment and asserted laches as the only ground. The Plain Dealer charged plaintiffs with a "ten year delay in filing" the lawsuit, which delay it argued prejudiced it as set forth in the affidavits and exhibits attached to its motion. Plaintiffs vigorously opposed the motion by brief in which reference to the deficiencies appearing in The Plain Dealer's proof were noted and supporting evidence, including the depositions of the current and former Executive Secretaries of the Guild (taken by the defendant) and defendant's responses to requests for admissions, were presented. The district court, however, relying principally on Boone v. Mechanical

Specialties Co., 609 F.2d 956 (9th Cir. 1979), granted the motion and dismissed the action on January 10, 1986.

STATEMENT OF FACTS

On April 12, 1972, the Guild filed a charge with the EEOC alleging that The Plain Dealer discriminated against its female employees as a class in hiring, promotion, job assignment and merit pay and that The Plain Dealer had been and was continuing to engage in an historical pattern and practice of sex discrimination. (R. 15: Motion for Summary Judgment, Exhibit A; R. 1: Complaint, Exhibit A).

On May 8, 1972, 26 days after the filing of the charge, the EEOC mailed EEOC Form No. 131 to The Plain Dealer, notifying the company that a charge alleging sex discrimination in hiring, wages and terms and conditions of

employment had been filed, and had been assigned Charge No. TCL2-1613 (R. 15: Motion for Summary Judgment, Exhibit C). Form No. 131 also put The Plain Dealer on notice that it had been charged with a "continuing" violation. Ibid. The form stated that the [Civil Rights] "Act does not contemplate that the name of the person bringing the charge be made available" at that stage of the proceeding, and the notice did not identify the person or organization filing the charge.

The most important directive contained in the notice read as follows:

> Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

The notice contained a statement that the EEOC's heavy backlog of work had made it impossible to predict when the EEOC would contact The Plain Dealer next but that it

would begin the investigation as soon as possible. Ibid.

Although the notice requested that any questions be held in abeyance until the investigation began, the notice did not bar inquiries and made clear that any information submitted in writing would be made a part of the file and considered at the time of the investigation. Form 131, Appendix at A-87-89. The Plain Dealer made no inquiries until May, 1976.

Sometime in the Spring of 1974, the EEOC advised the Guild, through an EEOC postcard form No. 196, that "because of the large number of complaints filed with it," it had been unable to process the charge. The EEOC informed the Guild, however, that any of three options was then available to it: (1) ask the EEOC to keep the charge open and process it when possible; (2) sue in Federal Court; or (3) authorize the EEOC to close the

charge without further action. (R. 15: Motion for Summary Judgment, Exhibit D). By letter dated September 4, 1974, Jack Weir indicated the Guild's decision to have the EEOC process the charge as soon as possible. (R. 15: Motion for Summary Judgment, Exhibit E). Weir spoke to the EEOC employee assigned to the charge prior to writing the September 4th letter to the EEOC Regional Director (R. 12: Deposition of Jack Weir, p. 33).

The EEOC began its investigation during the week of May 10, 1976, at which time an EEOC investigator, William Albert, informed The Plain Dealer that Charge No. TCL2-1613 alleging sex discrimination had been filed against it by the Guild. (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 1; Fields Affidavit, p. 2). On May 19, 1976, counsel for The Plain Dealer received a copy of Charge No. TCL2-1613 which had

been filed by the Guild. (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 1). The investigation by the EEOC lasted four years, from May, 1976 until October, 1980, when the EEOC issued its reasonable cause determination. (R. 15: Motion for Summary Judgment, Wilharm Affidavit, pp. 1-3). Conciliation efforts by the EEOC ended in March, 1982. (See Id., Wilharm Affidavit, p. 4 at ¶ 15.)

An examination of the record reveals that the lengthy investigative period was attributable to The Plain Dealer's lack of cooperation in providing information as requested by the EEOC, and its efforts to have the EEOC dismiss the charge.

The first response of The Plain Dealer upon receipt of notice of the commencement of investigation of the charge on June 22, 1976, was to demand a dismissal of the charge because the four-

year delay in providing notice and commencing the investigation allegedly had impaired its ability to respond (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 2). The Plain Dealer took this position notwithstanding that it received notification about the charge from the EEOC 26 days after the filing of the charge. When the EEOC, on June 24, 1976, notified The Plain Dealer that it would not dismiss the charge and requested documents and information about Guild employees for the previous six years, The Plain Dealer informed the District Director of the EEOC in a letter dated July 8, 1976, that it would not voluntarily submit the information requested (Ibid.). Without claiming as a basis therefor that any of the information requested was then unavailable, The Plain Dealer merely made an unsubstantiated assertion that the delay involved

was reason enough for its refusal to provide the information (R. 21: Brief of Plaintiffs in Opposition to Motion for Summary Judgment, Exhibit 1).

On August 25, 1976, the EEOC issued a subpoena demanding production of the documents it had previously requested. On September 1, 1976, The Plain Dealer filed a Petition to Revoke and/or Modify Subpoena and Testificandum/ Duces Tecum (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 3).

On September 28, 1977, the EEOC issued its decision denying revocation of the subpoena and directed The Plain Dealer to appear at the EEOC to produce documents. On October 17, 1977, The Plain Dealer responded to said directive by notifying the EEOC that it would not appear at the offices of the EEOC to produce documents. Ultimately, the EEOC informed counsel for The Plain Dealer

that the EEOC would not seek to enforce the subpoena. (Ibid.).

On July 3, 1980, The Plain Dealer, in a position paper submitted in response to the Guild's charge, alleged that its ability to respond to the charge had been "irreparably impaired" by lapse of time. (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 4). The Plain Dealer's attorney had asserted to the EEOC by letter dated June 22, 1976, only four years after the initial notice of the charge, that the records which the EEOC sought (basic personnel records which The Plain Dealer had been required four years earlier to preserve) were "no longer available." (R. 25: Reply Brief in Support of Motion for Summary Judgment, Ex. LL). However, The Plain Dealer at no time explained what, if any, efforts it had undertaken, subsequent to its receipt of the actual charge in May,

1976, to preserve its records and testimony of witnesses from that time forward.

On October 10, 1980, the EEOC issued a finding of reasonable cause and thereafter commenced conciliation efforts. (R. 15: Motion for Summary Judgment, Wilharm Affidavit, p. 4). When The Plain Dealer proved not to be cooperative in supplying data to assist conciliation efforts, the EEOC turned to the Guild to provide the needed information (R. 21: Plaintiffs' Brief in Opposition, Exhibit 2). The Guild had already proven to be very cooperative in the EEOC's conciliation efforts by providing relevant information (R. 21: Plaintiffs' Brief in Opposition, Exhibits 3 and 4).

On March 26, 1982, the EEOC issued a finding that it was unable to conciliate the charge, and on May 21, 1982, it issued a notice of right to sue (R. 21: Plaintiffs' Brief in Opposition, Exhibit

5). Plaintiffs then filed suit in federal court within the applicable ninety-day period from the issuance of the notice of right to sue.

The Court of Appeals' Decisions

Following the district court's summary dismissal of the complaint in January, 1986, plaintiffs timely appealed to the Sixth Circuit Court of Appeals pursuant to the specific statutory authorization of the Civil Rights Act, 42 U.S.C. § 2000e-5(j). In an opinion filed on March 6, 1987, a panel majority of the court of appeals reversed the district court's summary judgment in favor of the defendant[2/] (813 F.2d 101, Appendix at

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2/ In reversing the district court's dismissal on the ground of laches, the panel majority stressed this Court's discussion in Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-368 (1977), of the statutory emphasis on administrative resolution of discrimination charges. The panel (Footnote continued)

A-41). On April 29, 1987, the court of

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majority also emphasized that:

> Furthermore, Congress was not unaware of the delays created by the EEOC's administrative process when it reiterated in 1972 its preference for the administrative resolution of claims. In the course of Congress' 1972 expansion of the EEOC's jurisdiction, it was frequently noted that the Commission already had an approximately two year backlog of cases. H. Rep. No. 92-238, 92nd Cong., 2nd Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2147, 2167, 2170-71. Thus, Congress cannot have intended the EEOC's tardiness in addessing complaints to mandate a plaintiff's abandonment of the administrative process.

813 F.2d at 104, Appendix at A-39.

The panel majority noted that "the majority of a circuits have held that a plaintiff's "failure to file his Title VII claim until completion of the EEOC process [is] not inexcusable delay and cannot support the apppplication of laches." (Citations omitted, brackets in original). 813 F.2d at 103, Appendix at A-38.

Referring to the Plain Dealer's studied inaction despite having received notice of a charge of continuing sex discrimination, the

(Footnote continued)

appeals granted a rehearing of the appeal, en banc, thereby vacating the panel decision. 817 F.2d 30. On February 11, 1988, the court of appeals issued its en banc decision and affirmed the district court dismissal, over the

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panel majority stressed that:

> As several courts of appeals have noted, "because a defendant must have notice of pending EEOC action, prejudice is often minimal despite a significant delay before court action is initiated." Bratton, 649 F.2d at 667 n.8. See also Howard, 726 F.2d at 1533. The Plain Dealer knew in 1972 that a discrimination charge had been filed with the EEOC and that personnel records should be saved. Four years later, the Plain Dealer was given a copy of the charge, and so knew exactly what records and witnesses would be relevant.

813 F.2d at 104-5, Appendix at A-40-41.

The panel also noted that the record in the case demonstrated, "[t]hus, the loss of evidence and the delays in this case were substantially created by the Plain Dealer's lack of cooperation with the EEOC process." 813 F.2d at 105, Appendix at A-41.

vigorous dissent of five members of the court.

The en banc majority, in discussing some of the decisions of the circuits which previously had considered the question of whether a Title VII complaint was subject to dismissal on the grounds of laches, failed to acknowledge that the majority of circuits had rejected laches-dismissal based on a claim of prejudice from the delay occasioned by individuals awaiting the termination of administrative proceedings. The en banc majority, while urging that most circuits would permit dismissal of a complaint on the ground of laches, failed to note that the majority of circuits would permit dismissal only where an individual was shown to have intentionally caused delay in the administrative process. Significantly, while the en banc majority concluded that awaiting administrative processing would

not excuse an individual from charges of inexcusable delay, the majority totally failed to distinguish between a complaint alleging a pin-point act of discrimination and one alleging a continuing course of discriminatory conduct. Further, while the en banc majority paid lip service to the prior panel finding that The Plain Dealer contributed to the delay about which it complained, the en banc majority emphasized The Plain Dealer's claims of prejudice during the four years immediately after the filing of the charge of discrimination as justification for dismissal. However, the court never considered whether, in a case involving allegations of continuing discrimination, a remedy short of dismissal would have located a more just result.

In a vigorous dissent joined by four other members of the court, Judge Milburn urged that the statute, the policies

underlying the statute and a proper application of the doctrine of laches would not bar the action. Judge Milburn argued that "the majority's invocation of the doctrine of laches violates both the literal language of section 706(f)(1) and the "'federal policy policy requiring employment discrimination claims to be ..., whenever possible, administratively resolved before suit is brought in federal court.'" Kamberos v. GTE Automatic Electric, Inc., 454 U.S. 1060, 1063 (1981) (White, J., dissenting from denial of certiorari) (quoting Occidental Life Insurance, 432 U.S. at 368." 839 F.2d at 1158, Appendix at A-22.

In a survey of the decisions of other circuits on the issue of whether a private plaintiff could await the termination of the administrative processes without penalty to the maintenance of a later court action, Judge Milburn noted

that the Fifth,[3] Ninth,[4] Eleventh,[5] Fourth[6] and D.C.[7] Circuits all had concluded that a private plaintiff could not be penalized for choosing to forego the alternative of requesting a notice of right-to-sue from the EEOC and, instead, awaiting the completion of the administrative process. 839 F.2d at 1159, Appendix at A-23. Judge Milburn demonstrated that the Third Circuit is in close alignment with the courts mentioned

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[3] Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), on rehearing en banc, 619 F.2d 459 (5th Cir. 1980), aff'd, 452 U.S. 89 (1981).

[4] Brown v. Continental Can Co., 765 F.2d 810 (9th Cir. 1985).

[5] Howard v. Roadway Express, Inc., 726 F.2d 1529 (11th Cir. 1984).

[6] Holsey v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985).

[7] Rozen v. District of Columbia, 702 F.2d 1202, 1204 (D.C. Cir. 1983) (per curiam).

above. Judge Milburn noted that the Third Circuit has held[8/] that "the charging party has an absolute right to await termination of EEOC proceedings unless it would appear to a reasonable person that no administrative resolution would be forthcoming." 839 F.2d at 1161, Appendix at A-27.

The dissent also rejected the notion that inexcusable delay by the plaintiffs or prejudice suffered by the defendant had been shown. Judge Milburn pointed out that other circuits had held that prejudice is not demonstrated where the party "has failed to preserve evidence despite knowledge of a pending claim" (quoting Bernard v. Gulf Oil Co., 596 F.2d 1249, 1257 (5th Cir. 1979)). 839 F.2d at 1161, Appendix at A-28-29. More-

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8/ Waddell v. Small Tube Products, Inc., 799 F.2d 69, 72 (3rd Cir. 1986).

over, the dissent concluded that the assertion of laches also was precluded "because the delay ... was caused in substantial part by defendant's refusal to cooperate with the EEOC." 839 F.2d at 1162, Appendix at A-29. Judge Milburn rejected The Plain Dealer's claim that it had a legal right to challenge the EEOC records subpoena because, as the judge noted, the defendant's challenge to the subpoena was on a basis not permitted under the Act. 839 F.2d 1162, Appendix at A-30. See also, Separate Dissent of Keith, Circuit Judge, 839 F.2d at 1162, Appendix at 31; Separate Dissent of Edwards, Senior Circuit Judge, 839 F.2d 1163-64, Appendix at A-34.

In light of the important policy considerations raised by the en banc decision below and because of the profound adverse effect which the application of the majority decision

below will have upon the statutory mechanisms for eradicating discrimination in employment, petitioners seek review.

REASONS FOR GRANTING THE WRIT

I.

AN IMPORTANT QUESTION IS PRESENTED CONCERNING WHICH THERE ARE CONFLICTING APPROACHES WITHIN CIRCUITS AS WELL AS BETWEEN THE CIRCUIT COURTS OF APPEAL OVER WHETHER DISMISSAL ON THE GROUND OF THE EQUITABLE DEFENSE OF LACHES OF A TITLE VII ACTION BROUGHT BY PRIVATE PARTIES IS PERMITTED WHERE SUIT WAS COMMENCED WITHIN THE PERIOD PERMITTED BY THE ACT FOLLOWING ISSUANCE OF A NOTICE OF RIGHT TO SUE BY THE EEOC BUT WHERE THOSE INDIVIDUALS WAITED UNTIL THE COMPLETION BY THE EEOC OF THE ADMINISTRATIVE PROCESS AND WHERE THERE IS NO SHOWING THAT THE INDIVIDUALS CAUSED A DELAY IN THE ADMINISTRATIVE PROCESS.

A. Dismissal Of A Title VII Action On The Ground Of Laches Under The Circumstances Set Forth Above Is Not Permitted By And Is Inconsistent With This Court's Holding In **Albemarle Paper Co. v. Moody**, 422 U.S. 405 (1975), And The Teaching Of **Occidental Life Insurance Co. v. EEOC**, 432 U.S. 355 (1977).

The elements of the defense of laches have long been established by this Court

and are as follows: (1) a lack of diligence or inexcusable delay by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense. Costello v. United States, 365 U.S. 265, 282, 81 S. Ct. 534, 543 (1961); Gardner v. Panama Railroad Company, 342 U.S 29, 31, 72 S. Ct. 12 (1951). Proof of both these elements is essential to making the defense. See e.g. United States v. Weintraub, 613 F.2d 612, 619 (6th Cir. 1979).

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court considered the question of what standards should apply in deciding whether to award or deny backpay. Id. at 408. This Court noted that "[t]he power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions." Id. at 416. Further, this Court observed that: "when Congress

invokes the Chancellor's conscience to further transcendant legislative purposes, what is required is the principled application of standards consistent with those purposes ...." Id. at 417.

Noting, among other considerations, that the "primary objective" of Title VII

> "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"

id. at 417 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)), this Court held that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Id. at 421. The Court also held that "a party may not be 'entitled' to relief if its conduct of the

cause has improperly and substantially prejudiced the other party." Id. at 424. The standard of review in such cases was to be "whether [the trial court] 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." Id. This Court, therefore, has not declared that the action itself is barred upon application of the doctrine of laches, but rather that the district court will take into consideration the equities of the case when arriving at its judgment in the case after hearing on the merits. Indeed, barring the action in its entirety would be completely inconsistent with the purposes of eradicating discrimination throughout the economy.

In Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977), the Court considered whether the action brought by the EEOC was time-barred because it was not filed within 180 days of the filing of the

charge of discrimination. This Court held that there was no such bar. Id. at 361. The Court extensively discussed the emphasis in Title VII on administrative resolution of charges of discrimination.

In rejecting the company's argument that the absence of time limitations on the bringing of lawsuits would subject defendants to prejudice from stale claims, the Court observed that:

> Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, CFR § 1601.19 b(b) (1976), and when the EEOC has

> terminated its efforts to conciliate a dispute, §§ 1601.23, 1601.25.
>
> It is, of course, possible that despite these procedural protections a defendant in a Title VII enforcement action might still be significantly handicapped in making his defense because of an inordinate EEOC delay in filing the action after exhausting its conciliation efforts. If such cases arise the federal courts do not lack the power to provide relief. This Court has said that when a Title VII defendant is in fact prejudiced by a private plaintiff's unexcused conduct of a particular case, the trial court may restrict or even deny backpay relief. Albemarle Paper Co. v. Moody, 422 U.S. 405, 424-425, 95 S.Ct. 2362, 2374-2375, 45 L.Ed.2d 280. The same discretionary power "to locate 'a just result' in light of the circumstances peculiar to the case," ibid., can also be exercised when the EEOC is the plaintiff.

Id. at 372-373 (footnotes omitted). Thus, the holding in Albemarle Paper Co. v. Moody, supra, and the teaching of Occidental Life Insurance Co., supra, point away from a dismissal of a Title VII claim on the ground of laches where the plaintiff is

guilty of nothing more than waiting for the completion of the administrative process created by the statute before initiating suit. Indeed, this Court's extensive exposition in Occidental Life Insurance Co. v. EEOC, supra, concerning the legislative emphasis on resolving claims of discrimination through the administrative process despite the recognized administrative backlog of cases, 432 U.S. at 367-372, advocates strongly for the conclusion that an aggrieved party has an absolute right to await completion of the administrative process before bringing suit.

B. The Circuit Courts Of Appeal Are In Conflict As To Whether Dismissal Of A Title VII Action Is Permitted On The Ground Of Laches Where The Plaintiff Has Awaited Completion Of The Administrative Process Before Commencing Suit.

The majority of the circuits have held that a Title VII plaintiff is entitled to await completion of the

administrative process without penalty to the later maintenance of a suit.

In Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979)[9/] which involved the filing of a suit nine years after plaintiff had filed a charge with the EEOC, the Fifth Circuit Court of Appeals found that the nine-year delay did not indicate a lack of diligence on the plaintiff's part, and quoted the decision in Occidental Life Ins. Co. v. EEOC, supra, wherein the Supreme Court stated:

> When Congress first enacted Title VII in 1964, it selected "[c]ooperation and voluntary compliance...as the preferred means for achieving the goal of equality of employment opportunities." Id., 97 S. Ct. at 2455.

9/ Rehearing en banc was granted. See 604 F.2d 449 (5th Cir. 1979) (en banc per curiam). However, the court adopted the panel's opinion concerning laches. See 619 F.2d 459, 463 (5th Cir. 1980) (en banc), aff'd, 452 U.S. 89 (1981).

Bernard v. Gulf Oil Co., supra, at 1256. The Court of Appeals, in Bernard, continued:

> A legislative analysis of the 1972 amendments to Title VII is similar:
>
> > It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's right to redress are [sic] paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.
>
> 118 Cong. Rec. 7565 (1972).
>
> These statements clearly indicate that the private remedy ... is only an alternative method for a plaintiff to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forego this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC. We therefore hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches.

Bernard v. Gulf Oil Co., Id., at 1256, 1257 (Emphasis added).

The Fifth Circuit reaffirmed its holding in Bernard in Fowler v. Blue Bell, 596 F.2d 1276 (5th Cir. 1979). Fowler involved the filing of a charge of racial discrimination with the EEOC. Five years after the filing of the charge, the EEOC issued a determination of reasonable cause. Upon deciding not to file a civil action itself, the EEOC sent the plaintiff a notice of right-to-sue. The plaintiff filed suit within ninety days of receipt of the EEOC notice. The district court granted summary judgment in favor of defendant after finding that laches barred plaintiff's claim.

In reversing the decision of the district court, the Fifth Circuit Court of Appeals rejected the defendant's

argument that the plaintiff's decision not to initiate the suit sixty days after filing the EEOC charge, as allowed under EEOC reglations in effect at that time, but rather to wait for five years while the EEOC investigated the claim, constituted inexcusable delay. The Court, citing its decision in Bernard v. Gulf Oil Co., 596 F. 2d 1249 (5th Cir. 1979), declared:

> [T]he legislatively and judicially favored method of resolving Title VII claims is through the EEOC administrative process. Therefore, we should not penalize a claimant for awaiting the end of that process.

Fowler v. Blue Bell, supra at 1279.

The Bernard court cited Sangster v. United Air Lines, 438 F. Supp. 1221 (N.D. Cal. 1977), which involved an eight-year delay between the filing of the EEOC charge of sex discrimintaion and the filing of the suit. In Sangster, supra,

the court, in denying defendant's motion for summary judgment based on laches, concluded:

> Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

Sangster v. United Air Lines, Id., at 1228.

The Ninth Circuit Court of Appeals affirmed the district court's holding that the eight-year delay did not constitute inexcusable delay by the plaintiff. Sangster v. United Air Lines, 633 F. 2d 864 (9th Cir. 1980).

The Ninth Circuit has followed the holding in Sangster with one exception:

Boone v. Mechanical Specialities Co., 609 F.2d 956 (9th Cir. 1979).[10/]

In Boone, in addition to filing with the EEOC, the plaintiff had also filed discrimination charges with the California Fair Employment Practice Commission (CFEPC) and with the Office of Federal Contract Compliance (OFCC). The California charge was dismissed, and the Federal Contract Compliance office also dismissed the charge "as being unsubstantiated by fact." Boone, supra, 609 F. 2d at 957. Apparently no action was taken with respect to the charge by the EEOC, although that agency had on numerous occasions advised Boone that it would provide him with a right-to-sue letter. It was not until seven years had elapsed

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10/ Boone was relied on by the district court in the instant case in reaching its decision to dismiss petitioners' complaint. Appendix at A-48-A-50, A-54.

that it finally became apparent to Boone that the EEOC, much the same as the CFEPC and the OFCC, was not persuaded by him or any other information coming to it that he had a meritorious claim. He therefore asked for and obtained a right-to-sue letter and commenced his action without ever having received a reasonable cause determination from the EEOC.

In reaching its decision, the court in Boone specifically noted that what distinguished its case from Bernard v. Gulf Oil Co., supra, and Fowler v. Blue Bell, supra, was "the absence of any type of continuing administrative proceedings." Boone v. Mechanical Specialties Co., supra, at 960, and the Court took special care to acknowledge the validity of the policy, advocated in both Bernard and Fowler, of favoring the resolution of Title VII claims through the adminis-

trative process. The court in Boone stated:

> In the present case we state the exception and not the general rule. Normally, it may be reasonable for an aggrieved employee to allow the EEOC to retain jurisdiction over a Title VII action. The Act clearly encourages informal conciliation of grievances through the offices of the EEOC.

Boone v. Mechanical Specialties Co., supra, at 960 (Emphasis added).

The Boone decision has been substantially limited by subsequent decisions of the Ninth Circuit, as well as other circuits which have examined the issue. In Bratton v. Bethlehem Steel Corp., 649 F. 2d 658 (9th Cir. 1980), the Ninth Circuit Court of Appeals reversed a finding of laches by the district court and again emphasized the fact that the decision in Boone constituted a narrow exception to the general rule against penalizing a private plaintiff for exercising his statutory right to have his

Title VII claim resolved through the administrative process.

The rule of Bratton was recently reaffirmed by the Ninth Circuit in Brown v. Continental Can Co., 765 F. 2d 810, 814-815 (9th Cir. 1985). In Brown, the plaintiff's employment discrimination suit was dismissed by the district court because he was found to have filed more than ninety days after receipt of his right-to-sue letter. On appeal, the company argued that in any event the district court's order of dismissal should be affirmed under the alternate ground that the plaintiff's action was barred by the doctrine of laches. The court of appeals seized upon the opportunity to reiterate that the rule of Boone v. Mechanical Specialties Co. was emphasized by the Boone court itself to be an exception to the general rule that laches was not available as a defense to

a Title VII claim brought by a private individual. Brown v. Continental Can Co., supra, 765 F. 2d at 814. The court in Brown v. Continental Can Co. reaffirmed the Ninth Circuit's determination, which it steadfastly adhered to, that delay by the EEOC would not be imputed to the detriment of a private Title VII claimant.

> This circuit has recognized that EEOC delays are not to be charged against private plaintiffs and that complainants are not required to terminate the administrative process by requesting a notice of right-to-sue. See Bratton v. Bethlehem Steel Corp., 649 F. 2d at 667, n.8. Ordinarily, if the EEOC retains control over a charge, a private plaintiff will not be charged with its mistakes. Gifford, 685 F. 2d 1152.

Brown v. Continental Can Co., supra, 765 F. 2d at 815 [referring to Gifford v. Atchison, Topeka & Santa Fe Railroad Co., 695 F. 2d 1149 (9th Cir. 1982)].

The Fourth Circuit has also held that a private plaintiff cannot be

penalized for awaiting completion of the administrative process. In Holsey v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984), cert. denied, 470 U.S. 1028 (1985), the court of appeals rejected Armour's argument that laches barred plaintiff Bennett's claims despite the fact that Bennett's supervisor had died before trial. The court held: "that Bennett's decision to rely on the commission's administrative process before initating a private suit is not inexcusable delay." Id. at 211.

The Eleventh Circuit Court of Appeals also rejected the defense of laches asserted because of an almost six-year delay in filing suit in Howard v. Roadway Express, Inc., 726 F. 2d 1529 (11th Cir. 1984). The court stated that it was:

> ...reluctant to penalize a plaintiff who chooses to pursue "the legislatively and judicially

> favored method of relying on the administrative processes of the EEOC.

Howard v. Roadway Express, Inc., supra, 726 F. 2d at 1533. The court in Howard explained that its decision was not inconsistent with its previous decision in EEOC v. Dresser Industries, Inc., 668 F. 2d 1199 (11th Cir. 1982), which was cited by the district court in the case at bar, as well as by the defendant in support of its motion. The Howard court noted well that the court in Dresser "no way suggested that inexcusable delay attributable to the EEOC may be transferred to the plaintiff in a private suit." Id. at 1533, n.2. The District of Columbia Circuit is in accord with the position of the Fourth, Fifth, Ninth and Eleventh Circuit Courts. Rozen v. District of Columbia, 702 F. 2d 1202 (D.C. Cir. 1983).

The Court of Appeals for the Third Circuit appears closely aligned with the majority of circuit courts in that it has held that:

> In considering whether to apply laches to a plaintiff who has waited for administrative action, the court must neither undermine the EEOC's capacity to investigate charges of discrimination, nor undercut congressional policy of favoring reliance by plaintiff "on the administrative process of the EEOC."

Waddell v. Small Tube Products, Inc., 799 F.2d 69, 77 (3rd Cir. 1986). The court of appeals in Waddell qualified what the majority of circuits have held to be an absolute right to await termination of EEOC proceedings, by adding the proviso, unless "it would appear to a reasonable person that no administrative resolution will be forthcoming." Id. Moreover, the Wadell court stressed that:

> As this court suggested in Great A & P [EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (1984)], even if the district court

> finds that the elements of laches have been proven, the district court in the exercise of its discretion "must take into account whether or not a less drastic form of equitable relief than a complete dismissal of the action would have been more appropriate." 735 F.2d at 81.

The Seventh Circuit Court of Appeals has refused to recognize a Title VII plaintiff's right to await termination of the administrative process before initiating suit, by requiring the plaintiff to monitor or show some interest in prosecuting the claim while pending the administrative process. Jeffries v. Chicago Transit Authority, 770 F.2d 676, 682 (7th Cir. 1985), cert. denied, 475 U.S. 1050 (1986). The Sixth Circuit in the instant case and the Eighth Circuit (Whitfield v. Anheuser-Busch, Inc., 820 F.2d 243 (8th Cir. 1987)) have followed the reasoning of the Seventh Circuit in Jeffries, supra.

Although petitioners urge that the record in the instant case readily distinguishes this case from the decisions in Boone, Jeffries or Whitfield, petitioners urge that the rule followed by the majority of the circuits properly accommodates the Congressional policy favoring administrative resolution of charges of discrimination and the overriding policy of eradicating discrimination in employment.

II.

AN IMPORTANT QUESTION IS PRESENTED UPON WHICH THERE IS CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL, WHETHER IT IS CONSISTENT WITH THE POLICIES UNDERLYING TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, AND WITH THE TEACHING OF **OCCIDENTAL LIFE INSURANCE CO. v. EEOC**, 432 U.S. 355 (1977), AND OF **EEOC v. SHELL OIL CO.**, 466 U.S. 54 (1984), TO PERMIT A DISMISSAL ON THE GROUND OF LACHES OF AN ACTION BROUGHT BY PRIVATE INDIVIDUALS, PURSUANT TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, WHERE A SIGNIFICANT PART OF THE DELAY OCCASIONED DURING THE ADMINISTRATIVE PROCESS WAS CAUSED BY TACTICS OF THE

DEFENDANT EMPLOYER AND/OR WHERE THE PREJUDICE CLAIMED BY THE DEFENDANT WAS CAUSED IN WHOLE OR IN CONSIDERABLE DEGREE BY THE DEFENDANT EMPLOYER'S UNREASONABLE INACTION OR INDIFFERENCE TO THE PENDING CHARGE OF CONTINUING DISCRIMINATION WHICH WAS FILED WITH THE EEOC.

This Court in Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, rejected the company's argument that the absence of inflexible time limitations on the bringing of lawsuits would subject defendants to prejudice from stale claims and expressly observed that a Title VII defendant was alerted to the possibility of a lawsuit by the notice of the pending charge which the EEOC serves upon the charged party. Id. at 372. This Court concluded that "[t]his prompt notice serves ... to give him an opportunity to gather and preserve evidence in anticipation of a court action." Id. (Emphasis added).

Moreover, in EEOC v. Shell Oil Co., 466 U.S. 54 (1984), this Court observed that notice of a pending charge is provided to charged parties "to ensure that documents pertaining to allegations of discrimination are not destroyed." Id. at 78.

In the instant case, although The Plain dealer was provided with notice of the pending charge, numerous records were apparently destroyed. The Plain Dealer later successfully raised the destruction of records as one of the reasons why the defense of laches required dismissal. In its decision, the Sixth Circuit Court of Appeals accepted the lame excuse that because the EEOC notice "asked that defendant withhold any questions about the complaint until the investigation commenced," 839 F.2d at 1149, Appendix at A-2, the company was forced to suffer the prejudice of lost records because it was

somehow enjoined from making any further inquiry to protect its interests. See 839 F.2d at 1143, Appendix at A-13. The court of appeals also accepted without serious testing the company argument that it had suffered prejudice because witnesses were no longer available or because memories had faded. Other circuits, in the context of a laches defense asserted against a Title VII claim, have established a much more rigorous standard concerning an employer's failure to retain pertinent personnel records and/or to preserve evidence.

In Fowler v. Blue Bell, 696 F.2d 1276 (5th Cir. 1979), the defendant knew of the plaintiff's charge soon after it was filed. Two years later, the EEOC informed the defendant that it was considering the plaintiff's charge for a determination as to reasonable cause and told the defendant that it would be

notified as soon as a determination had been made. However, one year later, without inquiring as to the status of the charge, the defendant concluded that the EEOC was no longer pursuing the claim and destroyed all records relevant to the claim. The Court concluded:

> [The defendant's] destruction of these records violated clear EEOC regulations .... Thus any prejudice to [defendant] was the result of its own negligence and disregard of administrative regulations rather than [plaintiff's] delay.

Fowler, supra, at 1280. See also, EEOC v. Great Atlantic & Pacific Tea Co., 735 F. 2d 69, 80 (3rd Cir. 1984), cert. dismissed, ____ U.S. ____, 105 S.Ct. 307 (1984).

In Bernard v. Gulf Oil Co., Inc., supra, the court stated:

> A party cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim. American Marine Corp. v. Citizens Cas. Co., 447 F. 2d 1328 (5th Cir. 1971).

Bernard, supra, at 1257. The court emphasized the fact that since 1966 the EEOC had maintained a regulation prohibiting those charged with Title VII violations from destroying records relevant to the charge.

The court concluded:

> Therefore, defendants' argument that plaintiffs' delay prejudiced defendants is without merit. Insofar as defendants have been prejudiced, the evidence before the court shows that defendants' own negligence and disregard of EEOC regulations caused the prejudice.

Bernard, supra, at 1258. See, Rozen v. District of Columbia, 702 F. 2d 1201, 1204 (D.C. Cir., 1983), in which the Court held that any prejudice resulting to defendant by reason of defendant's destruction of its records after notice of the charge, and in violation of the regulation, could not be attributed to the plaintiff. The root cause of the defendant's problem in Rozen was of its

own making. The same rule should apply here.

Moreover, in light of the fact that The Plain Dealer had been notified in 1972 that it was charged with a continuing violation, there was absolutely no excuse for destroying pertinent records after 1976, the year in which The Plain Dealer received a copy of the charge and the EEOC began its investigation. See, EEOC v. Westinghouse Elec. Corp., 592 F. 2d 484, 487 (8th Cir. 1979).

The Sixth Circuit Court of Appeals similarly excused The Plain Dealer from any responsibility for the delay encountered by its challenge to the EEOC's request for records. 839 F.2d at 1155, Appendix at A-14.

However, the Third Circuit in EEOC v. The Great Atlantic & Pacific Tea Co., supra, held that the delay resulting from the employer's resistance to the EEOC

investigation was properly excluded from consideration on the issue of laches. Id. at 82.

III.

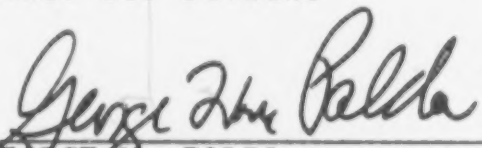
AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER IT IS CONSISTENT WITH THE HOLDING OF THIS COURT IN **ALBEMARLE PAPER CO. v. MOODY**, 422 U.S. 405 (1975), TO PERMIT A DISMISSAL ON THE GROUND OF LACHES, AS OPPOSED TO SOME OTHER FORM OF RELIEF, OF A LAWSUIT ALLEGING A CONTINUING PATTERN AND PRACTICE OF DISCRIMINATION, UP TO AND INCLUDING THE DATE OF FILING OF THE LAWSUIT.

Assuming, arguendo, that a defense of laches could serve to bar a Title VII action in which the plaintiff had awaited completion of the administrative process before commencing suit where that action involved allegations of a single distinct act of discrimination, the same result should not attach where the Title VII action involves allegations of a continuing course of discrimination and/or a pattern and practice of discrimination.

This Court recognized in Albemarle Paper Co. v. Moody, supra, that Congress envisioned a variety of forms of relief would be available in Title VII cases to correct the harm caused by employment discrimination. Moreover, the court in Occidental Life Insurance Co. v. EEOC, supra, emphasized the importance of the discretionary power of the federal courts "to locate ' a just result' in light of the circumstances of the case." Where continuing patterns of discrimination are alleged, denial of retroactive relief would sufficiently protect the defendant who has suffered prejudice from inexcusable delay, while permitting prospective relief against patterns or practices of discrimination. In the instant case, the court of appeals below totally failed to address the allegations continuing nature of the discrimination in fashioning the relief.

CONCLUSION

This case presents a timely opportunity to resolve a conflict among the circuit courts of appeal on questions that arise with surprising frequency in cases arising under Title VII of the Civil Rights Act of 1964, as amended. Petitioners respectfully urge this Court to accept this case for review.



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A P P E N D I X

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3140

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE CLEVELAND NEWSPAPER GUILD, LOCAL 1, et al.,
Plaintiffs-Appellants,

v.

THE PLAIN DEALER PUBLISHING CO.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed February 11, 1988

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS, and NORRIS, Circuit Judges; and EDWARDS, Senior Circuit Judge.

GUY, Circuit Judge, delivered the opinion of the court, in which Judges ENGEL, KENNEDY, KRUPANSKY, WELLFORD, RYAN and NORRIS joined and in which Judges LIVELY, (p. 15), MERRITT (pp. 16-18) and NELSON (pp. 19-20) also joined and filed separate concurrences. Judge MILBURN (pp. 21-30), delivered a separate dissenting opinion, in which Judge MARTIN joined, and Judges

KEITH (p. 31), JONES (pp. 32-33), and EDWARDS (p. 34), also joined and filed separate dissents.

GUY, Circuit Judge. This appeal involves the applicability of the doctrine of laches to bar a Title VII employment discrimination claim. 42 U.S.C. § 2000e-2. Specificially, we are asked to decide whether a claimant who awaits the outcome of the Equal Employment Opportunity Commission's (EEOC) administrative proceedings for a period of ten years before filing suit has caused inexcusable delay sufficient to justify the application of the doctrine of laches. The district court found the delay to have been inexcusable and, since it also found that the delay resulted in prejudice, it granted defendant's motion for summary judgment. We affirm.

I.

The facts are essentially uncontroverted. On April 12, 1972, the Cleveland Newspaper Guild (Guild), on behalf of its female members, filed a charge with the EEOC alleging sex discrimination in merit pay, promotions, assignments, and other terms and conditions of employment at The Plain Dealer Publishing Company. On May 8, 1972, defendant was sent a form notice of the charge of employment discrimination. The notice did not name the person or persons bringing the charge; however, it did state that "[s]ection 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved." Additionally, the notice asked that defendant withhold any questions about the complaint until the investigation commenced. The form stated that it was uncertain when defendant would be contacted in connection with the investigation due to the EEOC's "heavy backlog of pending work."

On April 12, 1974, the EEOC sent the Guild a form notice entitled "Charging Party Follow-up." It stated that the EEOC had not been able to process the charge and could not predict when it would begin to do so. Therefore, it asked the Guild

to choose one of three courses of action: (1) keep the charge open and have it processed when the EEOC could attend to it, (2) sue the Plain Dealer in federal court, or (3) close the charge without further action. In a letter dated September 4, 1974, Jack Weir, then Executive Secretary of the Guild, indicated the Guild's decision to have the EEOC continue to process the charge.

The EEOC's investigation began in May of 1976. On May 19, 1976, counsel for the Plain Dealer was given a copy of Charge No. 1613 filed by the Guild on April 12, 1972. This is the first time that the Plain Dealer became aware of who had filed the charge and why. On June 22, 1976, the Plain Dealer requested that the EEOC dismiss the charge and cease its investigation, asserting that the four-year delay had substantially impaired the Plain Dealer's ability to respond to the charge. On June 24, 1976, the EEOC notified the Plain Dealer that it would not dismiss the charge, and it requested documents and information regarding Guild employees for the previous six years. The Plain Dealer refused to submit the requested information.

On August 25, 1976, the EEOC issued a subpoena demanding production of the documents previously requested. The Plain Dealer then filed, on September 1, 1976, a petition to revoke and/or modify the subpoena. Over one year later, in September of 1977, the EEOC denied revocation and directed the Plain Dealer to appear at the EEOC for production of the documents. On October 17, 1977, counsel for defendant wrote the EEOC that it would not appear in the offices of the EEOC as ordered. Nothing further occurred in this case until July 30, 1979, when Guild Secretary J. Stephens Hatch wrote to the EEOC concerning the status of the charge. Almost a year later, on June 17, 1980, the EEOC notified defense counsel that the Commission would not seek to enforce the subpoena of August 25, 1976.

On July 3, 1980, the Plain Dealer submitted a position paper in response to the Guild's charge. It stated that because

of the lapse of time, management personnel and documents relevant to the charge were no longer available. On October 10, 1980, the EEOC issued a finding of reasonable cause and thereafter attempted to commence conciliation efforts. The attempt proved fruitless and, on May 21, 1982, the EEOC issued a right to sue notice to the Guild. The Guild then filed this suit in the district court on August 18, 1982. The defendant filed a motion for summary judgment based on the affirmative defense of laches, and the district court granted the motion.

The trial court determined that plaintiffs had failed to provide sufficient explanation for the ten-year delay in bringing suit. The trial court also found prejudice to the defendant in the form of unavailable witnesses, destruction of documentary evidence, and erosion of available witnesses' memories. As to the EEOC's notice to defendant to retain personnel records, the court found it too ambiguous to serve as a valid command. Accordingly, the court entered judgment for defendant.

On appeal, plaintiffs contend that the defense of laches will not lie to effect dismissal of a Title VII complaint brought by claimants who choose to await completion of the EEOC's administrative process before filing suit. Assuming that the doctrine of laches may be invoked, however, plaintiffs contend that they acted reasonably and did not inexcusably delay the proceedings. Plaintiffs also argue that defendant is barred from asserting the laches defense based on the doctrine of unclean hands.

II.

A Title VII claimant must file a claim with the EEOC (in a nondeferral state) within 180 days after the allegedly discriminatory act. 42 U.S.C. § 2000e-5(c). Once EEOC proceedings have terminated and the agency issues its right to sue notice, the claimant has 90 days to file suit in federal

court. *Id.* at § 2000e-5(f)(1). If, however, the EEOC proceedings are still in progress, a claimant *may* request a right to sue letter 180 days after filing of the charge. *Id.* This 180-day provision is not a statute of limitations. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1976). "[I]t simply provides that a complainant whose charge is not dismissed or promptly settled or litigated by the EEOC may himself bring a lawsuit, but that he must wait 180 days before doing so." *Id.* Thus, while there are no statutory limitations facing Title VII claimants awaiting EEOC action, we must decide whether equitable considerations affect a Title VII claimant's decision to indefinitely delay bringing suit.

A.

Equitable considerations have influenced the Supreme Court in the context of Title VII. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1974), the district court denied an award of back pay because the respondents initially disclaimed any interest in back pay, first asserting their claim five years after the complaint was filed. The district court concluded that the defendants had been prejudiced by this conduct. The Supreme Court agreed that a party may not be entitled to relief if its conduct of the cause has improperly and substantially prejudiced the other party. 422 U.S. at 424. The Court noted that district courts have discretion to locate "a just result" in light of the circumstances peculiar to the case, *Langnes v. Green*, 282 U.S. 531, 541 (1931), and that to deny back pay because a *particular* cause has been prosecuted in an eccentric fashion, prejudicial to the other party, did not offend the broad purposes of Title VII. 422 U.S. at 424 (emphasis supplied).

In *Occidental Life Ins. Co. v. EEOC*, 432 U.S. at 355, the Court addressed whether any time limitation is imposed on the EEOC's power to bring suit in federal court once a claim has been filed. That case had been filed by the EEOC approximately three years and two months after the complainant first

communicated with the EEOC, and five months after conciliation efforts had failed. 432 U.S. at 358. While the Court rejected the argument that the EEOC was required to bring an enforcement action within 180 days of the filing of the charge, it also recognized the possibility that, despite procedural protections afforded a Title VII defendant, delay in bringing suit could cause prejudice. *Id.* at 373. But in that case, the Court noted, "the federal courts do not lack the power to provide relief." *Id.*

B.

Against the backdrop of these cases, the courts of appeals have disagreed as to whether the application of equitable principles to Title VII cases permits a dismissal based on laches when, as here, a claimant chooses to await the termination of EEOC proceedings.

In *Bernard v. Gulf Oil Co.*, 596 F.2d 1249 (5th Cir. 1979), *on rehearing en banc*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981), the Fifth Circuit acknowledged that laches could apply to a Title VII case so as to bar an action; however, the court refused to hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process, some nine years later, constituted inexcusable delay. During that time, the EEOC was engaged in active conciliation efforts and, in fact, a conciliation agreement had been reached one month before plaintiffs filed suit. 596 F.2d at 1253. *Accord Fowler v. Blue Bell, Inc.*, 596 F.2d 1276 (5th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980).

The Ninth Circuit has also held that laches may be used as a defense to a Title VII action. *Boone v. Mechanical Specialties*, 609 F.2d 956, 959 (9th Cir. 1979). In *Boone*, the EEOC charge remained pending for almost seven years, while Boone repeatedly refused the EEOC's offer of a right to sue letter and asked the EEOC to keep his file open. 609 F.2d at 959. In the meantime, defendant suffered prejudice in the

form of lost witnesses and documentary evidence. The court held that laches barred the plaintiff's action due to his unexcusable delay, especially in the absence of continuing administrative proceedings. *Id.* at 960. Subsequently, however, the Ninth Circuit has repeatedly denied defendants relief based on laches, emphasizing that *Boone* stated the exception and not the general rule. *See Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658 (9th Cir. 1980) (four-year delay was not inexcusable where plaintiffs did not delay in requesting right to sue letters and no prejudice to defendant shown); *Gifford v. Atchinson Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149 (9th Cir. 1982) (ordinarily, if the EEOC retains control over a charge, a private plaintiff will not be charged with its mistakes); *Brown v. Continental Can Co.*, 765 F.2d 810 (9th Cir. 1985) (EEOC delays are not to be charged against private plaintiffs and complainants are not required to terminate the administrative process by requesting a notice of right to sue).

In *Rozen v. District of Columbia*, 702 F.2d 1202 (D.C. Cir. 1983), twenty-one months passed between the EEOC's determination of no reasonable cause to believe the discrimination allegation was true and the issuance of the right to sue notice. In dismissing his suit, the district court determined that Rozen had unreasonably and inexcusably delayed filing suit, and that defendant had been prejudiced by the delay. 702 F.2d at 1203. The court of appeals reversed. The court acknowledged that laches may apply to Title VII actions, but found the defense unsupportable on the record presented. *Id.* at 1204. The court refused to hold Rozen accountable for the delay in the issuance of the right to sue notice, distinguishing those cases where a plaintiff fails to file suit when that option is known and within the plaintiff's power. *Id.* (citing *EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982), and *Boone, supra*).

The Eleventh Circuit agreed in *Howard v. Roadway Exp., Inc.*, 726 F.2d 1529 (11th Cir. 1984). Howard filed a charge with the EEOC in December, 1976. In 1978, Howard's attor-

ney requested issuance of a right to sue letter, but later withdrew that request. In December, 1981, the EEOC determined that there was no reasonable cause to believe plaintiff's allegations and issued notice of right to sue. When plaintiff filed suit in March, 1982, defendant moved to dismiss, arguing that laches barred plaintiff's claim, and emphasizing plaintiff's early knowledge of his cause of action and his ability to obtain a right to sue letter as indicative of inexcusable delay. 726 F.2d at 1532. The Eleventh Circuit, too, recognized that the doctrine of laches could be applied, but held that Howard's failure to file his Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches. *Id.* at 1533. The court distinguished its earlier *Dresser* decision, 668 F.2d at 1199, where the doctrine of laches was applied to an action filed by the EEOC, stating that the *Dresser* court had not suggested that inexcusable delay attributable to the EEOC could be transferred to the plaintiff in a private suit. *Id.* at 1533 n.2.

In contrast is *Jeffries v. Chicago Transit Authority,* 770 F.2d 676 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1273 (1986), where plaintiff filed his race discrimination claim with the EEOC in November, 1974. The EEOC notified defendant of the charge, and it responded in December, 1974, denying the allegation of discrimination. The EEOC took no further action on the claim until June 9, 1982, when it informed the defendant that reasonable cause existed for the discrimination claim and invited the defendant to participate in conciliation. Defendant responded that the EEOC had lost jurisdiction over the matter due to the eight-year delay. A right to sue notice was issued in January, 1984. The Seventh Circuit affirmed the district court's dismissal based on the doctrine of laches, finding the ten-year delay to be manifestly unreasonable. 770 F.2d at 680. The court rejected plaintiff's major justification—ignorance of the statute and regulations giving him the option to request a right to sue letter—stating that

plaintiff should have known of his power to prod the agency through the language of the statute. *Id.* at 680. Accordingly, the court held that relying on the administrative process could not excuse a delay of this length and that plaintiffs must show "some interest in prosecuting their claims." *Id.* at 680-81.

The Third Circuit, in *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69 (3d Cir. 1986), also agreed that laches on the part of the plaintiff could support dismissal of a Title VII claim. Waddell's claim for unlawful termination was filed with the EEOC in March, 1975, and with the corresponding state agency in December, 1975. In August, 1976, the state agency dismissed the claim. Waddell requested reconsideration by the state agency, and also filed a new charge for failure to rehire. In October, 1976, the state agency denied the petition for reconsideration but, in January, 1977, it prepared a formal complaint based on the failure to rehire charge. The complaint was then referred to the EEOC for filing. The EEOC stated that it would assert jurisdiction on the sixtieth day after the charge was filed with the state agency, but would not engage in any compliance activities until the state agency had completed its investigation. The state agency then dismissed the complaint on the ground that the identical issues had been disposed of when it denied Waddell's petition for reconsideration. The state agency's letter notifying Waddell of the dismissal of his charge was sent April 29, 1977.

The state agency failed to notify the EEOC when it dismissed Waddell's charge, as it was obliged to do. In fact, the agency did not send the EEOC any such notification until November 30, 1981, more than four and one-half years later. In the meantime, Waddell wrote two letters to the EEOC about his case. When the EEOC finally was notified of the state agency's closing of the case, it conducted an investigation and determined that there was no reasonable basis to believe Waddell had been subject to discrimination, but that there was reasonable cause to believe Waddell had not been

rehired in retaliation for the charges he originally brought. Waddell received a right to sue letter in June, 1983, and brought suit in August, 1983.

After reviewing the cases discussed above, the Third Circuit concluded that, although plaintiffs have some obligation to monitor the progress of their charge and do not have the absolute right to await termination of EEOC proceedings where it would appear to a reasonable person that no administrative resolution will be forthcoming, whether the circumstances warrant the delay in a particular case must be decided on an *ad hoc* basis. 799 F.2d at 77. The circumstances which the court felt militated against the application of laches were that Waddell had written two letters to the EEOC, neither of which had elicited any reply; Waddell testified that he did not know of his right under the statute to request a right to sue letter; and Waddell had only a seventh grade education, and at the time in question, had no counsel. *Id.* At the same time, the court found the arguments on both sides of the laches question to have merit. Accordingly, it concluded that the situation was appropriate for the trial court's exercise of discretion, and affirmed the district court's refusal to dismiss based on laches. *Id.*

Finally, in *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243 (8th Cir. 1987), the Eighth Circuit affirmed the dismissal of plaintiff's case based on the doctrine of laches. While plaintiff filed his charge with the EEOC in January, 1973, and the EEOC held a hearing in October, 1974, the case then remained dormant for almost ten years, until June, 1983, when the EEOC issued a right to sue notice. Because Whitfield made no attempts to check on the status of his charge, and had not provided any meaningful explanation for his long silence or denied that he knew he could request a notice of right to sue, the court affirmed. *Id.* at 245.

In sum, each court to have considered the question agrees, at least in theory, that the doctrine of laches can bar a Title

VII action. These cases also illustrate the fact-dependent nature of the inquiry, as well as the necessity for the reasoned exercise of discretion on the part of trial courts.

III.

The defense of laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States,* 365 U.S. 265, 282 (1961). We conclude that the doctrine of laches, like other equitable considerations, should be applicable to a Title VII proceeding in practice as well as theory. At the same time, we understand the reluctance courts have shown in dismissing cases based on delay attributable at least in part to the EEOC. This reluctance is understandable in light of the fact that Title VII is "remedial legislation dependent for its enforcement on laymen." *Bethel v. Jefferson,* 589 F.2d 631, 642 (D.C. Cir. 1978). Moreover, as recognized by the Court in *Occidental Life,* 432 U.S. at 367-68, the administrative resolution of claims is the preferred method. We are not unmindful of these concerns. Nevertheless, in rare cases, the only avenue for relieving unfair prejudice to the defendant is dismissal of the plaintiff's claim.

Those cases that appear to allow claimants an unqualified right to await indefinitely termination of the administrative process often speak to the fact that claimants cannot be held responsible for the delays occasioned by the EEOC. But whether another party contributes to the delay is only one factor in assessing the reasonableness of a plaintiff's actions. The question is not purely one of assigning fault. As stated in Pomeroy's treatise: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth . . . [the] court into activity but conscience, good faith and reasonable diligence." J. Pomeroy, II Equity Jurisprudence, § 419 at 171 (S. Symons 5th ed.

1941). Thus, even though another party may have contributed to the delay, the court still must determine whether plaintiff's own delay or inaction inexcusably caused prejudice to the defendant.

IV.

The district court found that both elements of the laches defense had been satisfied; that is, that plaintiffs' lack of diligence had prejudiced the defendant. As to lack of diligence by plaintiffs, the court indicated that because of the fact the Guild was a labor union, with specific knowledge and responsibility in equal employment opportunity matters, it could not reasonably account for its continued inaction during the extended period that the charge was pending. It was undisputed that the Guild knew of its ability to obtain a right to sue notice and institute a civil action. And while the district court did not fault the Guild for initially refusing the first offer of a right to sue letter, the court was justifiably troubled by the lack of activity over the next eight years. The court also specifically referred to the lack of Guild contacts with the EEOC during that period.

Likewise, as noted by the district court, there was little EEOC activity during this time which could explain plaintiffs' failure to act. The EEOC did not take enforcement action on the subpoena issued to discover relevant information. Moreover, no conciliation ever occurred. In other words, there was nothing ongoing which the Guild could point to in order to justify its inaction.[1]

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[1]On appeal, the Guild has asserted that part of the reason it delayed bringing suit was because it was monitoring a parallel charge against the Cleveland Press, which it believed would, when concluded, establish a precedent for the resolution of the charge filed against the Plain Dealer. This argument was not raised below and is not properly before us. Consequently, we do not consider it. We note in passing, however, that the argument is not helpful to the Guild's position. The fact that the Guild felt it was in its interest to wait does little to offset as an equitable consideration the prejudice being suffered by the defendant.

The Guild now argues that it was defendant who delayed the administrative process, by refusing to cooperate with the EEOC. This argument ignores, however, the prejudice resulting from the four-year delay that occurred before defendant received a copy of the charge and, further, it erroneously presupposes that defendant's assertion of prejudice at that point was somehow wrongful. In short, this contention does not persuade us that the court erred in finding inexcusable delay.

No one seriously disputes the district court's finding that defendant has suffered prejudice in the form of lost witnesses and documentary evidence. Affidavits submitted in the district court detail those witnesses who are no longer available to defendant and their specific knowledge as to the underlying dispute. The Guild argues, however, that defendant was informed that a sex discrimination charge had been filed and was ordered to retain all records, and, therefore, if defendant suffered prejudice, it was of its own making.

The district court found that the EEOC's notice to defendant to retain personnel records was too ambiguous to serve as a valid command. Under the specific circumstances of this case, we agree. It must be kept in mind that the defendant was not initially informed of any of the details of the charge. It was EEOC policy at that time not to send an actual copy of the charge. Accordingly, all defendant knew was that a charge of employment discrimination based on sex had been filed against it. It was not until four years after the filing of the charge that the defendant received an actual copy of it. In the meantime, it was, of course, impossible to determine which personnel records were "relevant" to the unknown charge. In any event, retention of records would still not alleviate the problem of witnesses who have become unavailable or whose memories have faded.

We find no error in the district court's application of the doctrine of laches under these circumstances.

V.

We must also reject plaintiffs' argument that defendant is barred from equitable relief by the doctrine of unclean hands. The unclean hands doctrine derives from the equitable maxim that "he who comes into equity must come with clean hands." This maxim "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior" of the opposing party. *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945).

While the defendant clearly refused to cooperate with the EEOC's administrative process, it asserted that by the time that process began, four years after the charge had been filed, it had already suffered prejudice. Defendant consistently maintained that position. There was no indication that this position was advanced in bad faith. Moreover, we have found no authority for the proposition that one resisting an administrative process by asserting a legal defense can be found to have unclean hands. Consequently, we do not believe that the doctrine of unclean hands operates here to deny defendant relief.

VI.

We affirm the district court's holding because we believe that the court's power to "locate a just result" includes the possibility that a case may be dismissed on the basis of laches. We find no abuse of discretion in the court's dismissal of this case, nor clear error in its findings of lack of diligence on the part of the plaintiffs and prejudice to the defendant. We emphasize, however, that dismissal of a plaintiff's claim is an extreme result, and should be accomplished only when the prejudice to the defendant can be avoided in no other way. Accordingly, the judgment of the district court is AFFIRMED.

LIVELY, Chief Judge, concurring. I concur fully in Judge Guy's opinion for the court and write separately merely to emphasize the fact that this court will treat defenses of laches in Title VII actions on a case-by-case basis. As this court and others have noted in requiring a liberal construction of Title VII, actions under this statute are often "filed by lay complainants who are unfamiliar with the niceties of pleading and are acting without assistance of counsel." *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 131 (6th Cir. 1971). However, that is not the situation in this case. Here the plaintiff is a union, thoroughly conversant with the requirements of Title VII and represented by highly qualified counsel. Moreover, the Guild has stated to this court that it delayed filing suit in this action because it was monitoring a parallel action against another newspaper. It apparently viewed the complaint against the *Cleveland Press* as presenting a stronger case of a violation and hoped for a favorable precedent to control or at least influence the decision in this case. Thus, we are not confronted with a situation in which an alleged discriminatee assumed that having filed a charge with the EEOC, he was required to await further action by the EEOC before seeking judicial relief.

We review application of the equitable doctrine of laches under an abuse of discretion standard, *Jeffries v. Chicago Transit Authority*, 770 F.2d 676, 681 (7th Cir. 1985), and I find no abuse of discretion in the district court's application of the doctrine in dismissing the present action.

MERRITT, Circuit Judge, concurring. I agree with the Court's laches argument in this en banc case if no statute of limitations is applicable.

It seems to me, however, that the Court ignores the fact that there is a statute of limitations written into the statute in question. Subsection (f)(1), 42 U.S.C. § 2000e-5(f)(1), says: "If a charge is filed with the commission" and "if within one hundred and eighty days from the filing of such charge . . . the commission has not filed a civil action under this section . . . or the commission has not entered into a conciliation agreement to which the person aggrieved is a party, the commission . . . shall so notify the person aggrieved *and within ninety days after the giving of such notice a civil action may be brought* against the respondent named in the charge . . . ." The statute goes on to provide for a stay of the civil action in federal court for further conciliation: "Upon request, the Court may, in its discretion, stay further proceedings *for not more than sixty days* pending . . . further efforts of the Commission to obtain voluntary compliance."

The mandatory language of this section requires the EEOC either to bring an action itself or enter into a conciliation agreement, failing which the commission "shall so notify" the charging party within 180 days. Here the commission failed to give any notice for two years. It seems to me that Congress plainly intended by enacting the ninety day filing requirement and the sixty day stay provision to require both the EEOC and the courts not to allow disputes under this section to fester and drag on indefinitely. I would therefore interpret this section to provide a 180 day EEOC conciliation period, at the end of which the employer can require the EEOC to send the contemplated notice. The court can then allow another period of "not more than sixty days" for conciliation; the judicial proceedings must then go forward. That is what the plain language of the statute contemplates, and that is the way it should be enforced.

The Second Circuit in *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975), interpreted the 90 day requirement for filing a civil action as a statute of limitations for these disputes, and I agree. Under such an interpretation there is no need for the application of the "equitable" doctrine of laches because there is a "legal" statute of repose.

Here the EEOC did not give the required notice at the end of the 180 day period, and the employer did not insist on it. In such cases, the 90 day period is not triggered until the EEOC affirmatively notifies the charging party that it "has not entered into a conciliation agreement," thereby extending the 180 day period until EEOC notice is given. That notice was plainly given on April 12, 1974, two years after the charge was filed. The notice further advised the charging parties that they could sue in federal court since the EEOC had not been able to process the case. The 90 day period began to run at that time, and it would have run long before this suit was brought.

We should not permit the EEOC to alter the clear language of the statute by regulation. The regulations set up a procedural regime which is inconsistent with the procedure contemplated by 42 U.S.C. § 2000e-5(f)(1). The regulations provide that an aggrieved party may request notice of right to sue and the EEOC shall issue such notice "at any time after the expiration" of 180 days from the date of filing of the charge. 29 C.F.R. § 1601.28(a)(1) (1987). The regulations further purport to authorize aggrieved persons to bring a civil action within 90 days from the receipt of the notice of right to sue. 29 C.F.R. § 1601.28(e)(1) (1987). The statute, however, clearly states that if within 180 days from the filing of the charge, the commission has not filed a civil action or entered into a conciliation agreement, the commission must notify the aggrieved person and "*within ninety days* after the giving of such notice a civil action may be brought . . . ." 42 U.S.C. § 2000e-5(f)(1). This language clearly contemplates that the notice from the EEOC be timely and that the 90 day

statute of limitations run from that notice. In this case, the Guild received the notice contemplated by the statute in 1974, thus triggering the 90 day statute of limitations.

It seems to me that this 90 day period should be used as the period of limitations in light of the words of the statute. In view of the conflicts in the circuits and the confusion with respect to the applicability of the 90 day statute of limitations, I would apply this rule prospectively as did the Second Circuit in the *DeMatteis* case, not retroactively. *See DeMatteis v. Eastman Kodak Co.*, 520 F.2d 409 (2d Cir. 1975)(on rehearing). Normal tolling doctrines, including equitable tolling, should apply. *See Morgan v. Washington Mfg Co.*, 660 F.2d 710 (6th Cir. 1981). I would emphasize that I agree with the court that there must be a laches period if the 90 day language of the statute is not applied.[1] Otherwise the dispute could drag on for fifty years or more. Immortality is divinely to be wished for lawyers but not for their lawsuits and their appeals.

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[1]Subject to rebuttal, the laches period should presumptively be the same 90 day period as provided for in the statute. *See Tandy Corp. v. Malone & Hyde, Inc.* 769 F.2d 362 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 2277 (1986).

DAVID A. NELSON, Circuit Judge, concurring. I concur fully in the court's opinion, except insofar as the first paragraph of Part II might lend itself to the interpretation that we are saying the EEOC is automatically foreclosed from taking any further action once it has started the 90-day clock running, under 42 U.S.C. § 2000e-5 (f)(1), by giving notice that the government has neither filed a civil action nor entered into a conciliation agreement. If, as Judge Merritt believes, the notice given by the EEOC in April of 1974 was such a notice[1] —an issue that has not been briefed by the parties and that I would prefer not to decide without the benefit of full briefing — it seems to me that even though the EEOC did not consider itself foreclosed from going forward with the administrative proceedings, and probably was not foreclosed from doing so, the Plain Dealer might very well have had a statute of limitations defense against the private action once the 90 days had run without the Guild having filed suit.

In light of *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982) — a decision handed down seven years after the Court of Appeals for the Second Circuit issued its decision in *De Matteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975) — it appears probable that the 90-day filing period operates as a statute of limitations and not as a jurisdictional requirement. A statute of limitations defense is subject to waiver (*Zipes*, 455 U.S. at 393), and because that defense does not clearly appear on the face of the complaint and has never been raised in the answer or by motion to dismiss, I assume it has been waived. See *Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964), and *Pierce v. County of Oakland*, 652 F.2d 671 (6th Cir. 1981). Again, however, this is an issue that I would prefer not to decide without the benefit of full briefing.

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[1] *Cf. New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65 n.5 (1980): "As we read the statute, the Commission was *required* to issue that letter after 180 days. . . ." (emphasis supplied).

I agree with Judge Edwards that the case before us is essentially a suit in equity. Accordingly, I see nothing novel in applying the equitable defense of laches here. *Cf. Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 373 (1977), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424-25 (1975). It is true that courts of equity will not normally apply the doctrine of laches before a limitations period prescribed by the legislature has expired, but there is nothing inequitable about resorting to laches after the statute of limitations has run, where the defendant has pleaded the equitable defense and not the legal one.

In holding that the district court did not abuse its discretion in applying the doctrine of laches under the particular facts of this case, we are not deciding, I take it, whether the notice issued by the EEOC in April of 1974 started the running of a 90-day limitations period that the Plain Dealer could have raised as an affirmative defense in its answer to the complaint. The answer contains no such defense, so the issue is not before us.

MILBURN, Circuit Judge, dissenting. Because I believe section 706(f)(1) of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e-5(f)(1), and the policies it reflects preclude invocation of the equitable doctrine of laches where the charging party elects to await completion of the EEOC's processing of the charge and issuance of a right-to-sue notice prior to filing suit, and because I believe that a proper application of the doctrine of laches in the present case would not bar plaintiff's claim, I must respectfully dissent.

I.

Where, as here, an action arises under a statute enacted by Congress, the doctrine of separation of powers requires that courts be "circumspect in adopting principles of equity," including the doctrine of laches, in order not to "risk frustrating the will of the Legislature." *County of Oneida v. Oneida Indian Nation*, 105 S. Ct. 1245, 1266 & n.12 (1985) (Stevens, J., dissenting); *see also id.* at 1257 ("as Justice STEVENS properly recognizes. . . . application of the equitable defense of laches in an action at law would be novel indeed."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-20 (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193-95 (1978). "While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . it is equally —and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *Hill*, 437 U.S. at 194 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Courts may not invoke the doctrine of laches where to do so would be inconsistent with national policies and priorities established by Congress. *See County of Oneida*, 105 S. Ct. at 1257 n.16; *cf. Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977) ("State [statute of] limitations periods will not be borrowed if their application would be inconsistent with the

underlying policies of the federal statute."). However, the majority's invocation of the doctrine of laches violates both the literal language of section 706(f)(1) and the " 'federal policy requiring employment discrimination claims to be . . ., whenever possible, administratively resolved before suit is brought in federal court.' " *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060, 1063 (1981) (White, J., dissenting from denial of certiorari) (quoting *Occidental Life Insurance*, 432 U.S. at 368).

Section 706(f)(1) expresses "the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities."[1] *Occidental Life Insurance*, 432 U.S. at 368. Section 706(f)(1) provides, in relevant part:

> If a charge filed with the [EEOC] . . . is dismissed . . . or if within one hundred and eighty days from the filing of such charge . . . the [EEOC] has not filed a civil action . . ., or . . . entered into a conciliation agreement . . ., the [EEOC] shall so notify the person aggrieved and within ninety days . . . a civil action may be brought . . . by the person claiming to be aggrieved . . . .

Regulations promulgated by the EEOC provide that the charging party may request a right-to-sue notice after 180 days from the filing of the charge, *see* 29 C.F.R. § 1601.28(a), but nothing in section 706(f)(1) or the regulations require that a request be made within a certain time or at all. *Kamberos*, 454 U.S. at 1061 (White, J., dissenting). While Congress permitted the charging party to elect to circumvent lengthy EEOC proceedings, Congress expressly intended that recourse to a civil action would "be the exception and not the rule, and that the vast majority of complaints [would] be handled through the offices of the [EEOC]." 118 Cong.

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[1]The district court's opinion does not contain any discussion of section 706(f)(1) and the policies it reflects.

Rec. 7563, 7565 (1972) (Conference Report on H.R. 1746, the Equal Employment Opportunity Act of 1972).

Section 706(f)(1) provides "only an alternative method for a plaintiff to obtain relief from discrimination" and the charging party "cannot be penalized for choosing to forego this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC." *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1257 (5th Cir. 1979);[2] *see also Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985) ("EEOC delays are not to be charged against private plaintiffs and . . . complainants are not required to terminate the administrative process by requesting a notice of right-to-sue."); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532-33 (11th Cir. 1984) (quoting *Bernard*, 596 F.2d at 1257) (footnote omitted) (" '[T]he private remedy allowed by [section 706(f)(1)] is only an alternative method to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forego this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC.' "); *cf. Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984) (charging party's "decision to rely on the [EEOC's] administrative process before initiating a private suit is not inexcusable delay."), *cert. denied*, 470 U.S. 1028 (1985); *Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983) (per curiam) (charging party not penalized where EEOC delayed issuance of right-to-sue notice for twenty-one months after reasonable cause determination). *See generally* 4 A. Larson & K. Larson, *Employment Discrimination* § 48.32(c)(3), at 9A-153-54 (1985) ("As long as there

[2]The Fifth Circuit granted a petition for rehearing en banc on September 27, 1979. *See* 604 F.2d 449 (5th Cir. 1979) (en banc per curiam). However, in its subsequent opinion, the court adopted that part of the panel's opinion relied on in this opinion. *See* 619 F.2d 459, 463 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981).

remains enough evidence to proceed to trial, a potentially meritorious claim should not be barred because the EEOC delayed in concluding its proceedings."). Plaintiff's "failure to file [its] Title VII claim until completion of the EEOC process was not inexcusable delay and cannot support the application of laches." *Howard,* 726 F.2d at 1533.

The literal language of section 706(f)(1) leads inexorably to the conclusion that after 180 days have elapsed "the [charging party] may either file a private action within 90 days after EEOC notification or continue to leave the ultimate resolution of his charge to the efforts of the EEOC." *Occidental Life Insurance,* 432 U.S. at 361. Moreover, the legislative history of section 706(f)(1) evinces that Congress did not intend the charging party's statutory right to await termination of EEOC proceedings to be emasculated by lengthy EEOC delays. Both the House and Senate Reports expressly state that the very purpose of section 706(f)(1) was to give the charging party an *option* to circumvent lengthy EEOC delays resulting from the EEOC's burgeoning work load and insufficient resources. H.R. Rep. No. 238, 92nd Cong., 2d Sess., *reprinted in* 1972 *U.S. Code Cong. & Admin. News* 2137, 2147-48; *Occidental Life Insurance,* 432 U.S. at 364 (quoting S. Rep. No. 92-415, p.23 (1971)).

The EEOC interprets section 706(f)(1) as authorizing the charging party to await the outcome of the EEOC's efforts to resolve the charge prior to filing suit unless the charging party intentionally delays the proceedings. Brief of EEOC as amicus curiae at 10. It is well-settled that courts must show " 'great deference to the interpretation given the statute by the officers or agency charged with its administration.' " *Environmental Protection Agency v. National Crushed Stone Association,* 449 U.S. 64, 83 (1980) (quoting *Udall v. Tallman,* 380 U.S. 1, 16 (1965)). Congress charged the EEOC "with interpreting, administering, and enforcing Title VII," and its "interpretation of Title VII is to be accorded 'great deference.' " *Parr v. Woodmen of the World Life Insurance*

Co., 791 F.2d 888, 892 (11th Cir. 1986) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971)); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 79 n.36 (1984); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979); *Hale v. Marsh*, 808 F.2d 616, 620-21 (7th Cir. 1986); *EEOC v. Texas Industries, Inc.*, 782 F.2d 547, 551 (5th Cir. 1986); *Isaac v. Harvard University*, 769 F.2d 817, 826-27 (1st Cir. 1985). The EEOC's interpretation of section 706(f)(1) is well-supported by the statute's language and legislative history and should not be rejected by this court.

Section 706(f)(1) not only authorizes the charging party to await completion of the EEOC proceedings prior to filing suit, but also provides that a suit is timely if filed within ninety days after the charging party receives notice of the EEOC's decision not to take action itself. *See, e.g., Ringgold v. National Maintenance Corp.*, 796 F.2d 769, 770 (5th Cir. 1986) (per curiam); *Mosel v. Hills Department Store, Inc.*, 789 F.2d 251, 252 (3d Cir. 1986) (per curiam); *Soso Liang Lo v. Pan American World Airways, Inc.*, 787 F.2d 827, 828 (2d Cir. 1986) (per curiam); *Josiah-Faeduwor v. Communications Satellite Corp.*, 785 F.2d 344, 346 (D.C. Cir. 1986) (per curiam); *Norris v. Florida Department of Health & Rehabilitative Services*, 730 F.2d 682 (11th Cir. 1984) (per curiam). Where an action is based upon a statutory right for which Congress has provided a limitations period, laches is not a defense if the action is filed within the applicable limitations period. *See United States v. RePass*, 688 F.2d 154, 158 (2d Cir. 1982). "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitations is definitive." *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). Plaintiff's action was filed within the applicable statute of limitations period, and, therefore, laches is not a defense.

II.

Assuming *arguendo* that section 706(f)(1) does not authorize the charging party to await termination of EEOC proceedings before filing suit, a proper application of the doctrine of laches would permit plaintiff to proceed with its claim. To establish the affirmative defense of laches, a defendant has the burden to show both an inexcusable delay by the plaintiff and prejudice to the defendant. *Gardner v. Panama R.R.*, 342 U.S. 29, 31 (1951) (per curiam). Courts that have invoked laches despite the language of and the policies reflected by section 706(f)(1) have found inexcusable delay only where the charging party failed to "monitor" or "show some interest" in the progress of the charge or where "it would [have] appear[ed] to a reasonable person that no administrative resolution [would] be forthcoming" because the EEOC was no longer actively engaged in the administrative process. *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 77 (3d Cir. 1986); *Jeffries v. Chicago Transit Authority*, 770 F.2d 676, 682 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1273 (1986).[3] Neither of these criteria is satisfied in the present case.

The court in *Jeffries* declined to decide whether the charging party must "necessarily demand" a right-to-sue notice, but instead held that the plaintiff's failure to demonstrate "some interest" in prosecuting his claim supported a finding of inexcusable delay. The plaintiff in *Jeffries* filed his charge of discrimination in November 1974, but initiated no further contact with the EEOC until January 1984, when the EEOC issued the right-to-sue notice. The court concluded that the

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[3]The Ninth Circuit held in *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 959 (9th Cir. 1979), that the plaintiff's failure to avail himself of his option to request a right-to-sue letter supported a finding of inexcusable delay, but the Ninth Circuit has subsequently refused to follow the reasoning in *Boone*. *Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985).

plaintiff "should at least have reached the agency" and that the plaintiff's failure to write or call the EEOC for at least nine years was inexcusable. 770 F.2d at 680.

The facts of *Jeffries* are in sharp contrast to those of the present case. Two years after filing the charge, plaintiff inquired about the status of the charge and requested that the EEOC proceed with its investigation as soon as possible. Further, plaintiff again contacted the EEOC in July of 1979 concerning the status of the charge. Finally, plaintiff contacted the EEOC repeatedly in 1981 concerning the employees covered by the charge and defendant's failure to cooperate with conciliation efforts. Plaintiff's repeated efforts to monitor the progress of its charge clearly demonstrated plaintiff's interest in prosecuting its claim. *See Jeffries*, 770 F.2d at 680; *see also Rozen*, 702 F.2d at 1204; *Gifford v. Atchison, Topeka & Santa Fe Ry.*, 685 F.2d 1149, 1152 (9th Cir. 1982).

On the other hand, the court in *Waddell* held that the charging party has an absolute right to await termination of EEOC proceedings unless it would appear to a reasonable person that no administrative resolution would be forthcoming. The court emphasized that "plaintiffs may reasonably delay while the EEOC is actively engaged in the administrative process" and that courts must not "undermine the EEOC's capacity to investigate charges of discrimination . . . nor undercut congressional policy of favoring reliance by plaintiffs 'on the administrative process of the EEOC.' " 799 F.2d at 77 (citation omitted) (quoting *Bernard*, 56 F.2d at 1257). The court remanded to the district court rather than deciding whether the EEOC's proceedings in the case before it were active.[4]

The court did, however, cite with approval the decision in *Bernard* where the court characterized EEOC proceedings of nine years as both "active" and "continuing." 596 F.2d

[4]In the present case, the district court made no inquiry or findings in regard to whether the EEOC's investigation was active.

at 1256. In *Bernard,* the charge was filed in 1967 and a reasonable cause determination was made in 1968. The EEOC then pursued conciliation efforts for seven years until the EEOC informed the plaintiffs that the defendants did not wish to continue conciliation efforts. The plaintiff did not request a right-to-sue notice for more than a year following this notification.

Once the EEOC's investigation began in the present case, it was both "active" and "continuing" until issuance of the right-to-sue notice. Between 1976 and 1980 the EEOC's efforts were directed at securing evidence which defendant refused to provide even in the face of an EEOC subpoena. The EEOC made a reasonable cause determination in 1980 and commenced conciliation efforts which continued until 1982 when the right-to-sue notice was issued.[5]

The prejudice prong of the laches analysis requires a showing that the defendant's chances of success have been diminished by loss of evidence or unavailability of witnesses. *Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 844 (D.C. Cir. 1982); *Bernard,* 596 F.2d at 1257. The fact that defendant destroyed documents and records after receiving notice of the charge will not suffice to establish prejudice since the records were destroyed "in violation of the EEOC regulation that requires an employer against whom a discrimination claim is filed to 'preserve all personnel records relevant to the charge or action until final disposition of the charge or action.' " *Rozen,* 702 F.2d at 1204 (quoting 29 C.F.R. § 1602.14(a) (1977)). "A party cannot assert the defense of laches merely because it has failed to preserve evidence

[5]The district court made no inquiry about whether a reasonable person in plaintiff's position would have realized that an administrative resolution would not be forthcoming. The district court inexplicably focused its analysis on whether there was any excuse for the EEOC's delay. Whether the EEOC's delay was justified is wholly irrelevant in determining whether plaintiff's delay was inexcusable.

despite knowledge of a pending claim." *Bernard,* 596 F.2d at 1257. *See generally* A. Larson & K. Larson, *supra,* § 48.32(c)(2), at 9A-152.

The fact that certain individuals who had been responsible for personnel matters are no longer employed by defendant is insufficient to establish prejudice because defendant made no showing that these witnesses were unavailable. "The fact that there have been personnel changes or that employees have retired is irrelevant unless those employees are unavailable." *Bernard,* 596 F.2d at 1257; *see also EEOC v. Great Atlantic & Pacific Tea Co.,* 735 F.2d 69, 84 (3d Cir.), *cert. dismissed,* 469 U.S. 925 (1984). While defendant did establish that other individuals who had been responsible for personnel matters were deceased, defendant made no showing that these deaths would have prejudiced its case had the records not been destroyed in violation of the EEOC regulation. Any prejudice resulting from the death of these witnesses might have been cured by the records required to be preserved by the EEOC regulation. *See Gull Airborne Instruments,* 694 F.2d at 845; *Bernard,* 596 F.2d at 1257.

Defendant's assertion of laches is precluded not only by its failure to establish prejudice and inexcusable delay, but also because the delay in the present case was caused in substantial part by defendant's refusal to cooperate with the EEOC. "If the party which advances the defense of laches is responsible for the delay or contributes substantially to it he cannot take advantage of it." *Potash Co. v. International Minerals & Chemical Corp.,* 213 F.2d 153, 155 (10th Cir. 1954); *see also Covelo Indian Community v. Watt,* 551 F. Supp. 366, 381 n.12 (D.D.C. 1982). "A court of equity should not . . . permit a defendant to assert a laches defense . . . where that same defendant was in some degree responsible for the lapse of time at issue." *Gruca v. United States Steel Corp.,* 360 F. Supp. 38, 47 (E.D. Pa. 1973), *rev'd on other grounds,* 495 F.2d 1252 (3d Cir. 1974).

More than three years of the delay in the present case was caused by defendant's refusal to produce records voluntarily and to comply with an EEOC subpoena. Defendant urges that we ignore this fact because it had a legal right to refuse to comply with the EEOC subpoena. However, the right to challenge an EEOC subpoena is limited to the assertion that the evidence subpoenaed is not relevant to any matter under investigation or that the subpoena does not describe with sufficient particularity the evidence to be produced. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1). Defendant's challenge to the subpoena was based on its belief that the EEOC had waited too long in commencing its investigation. This is not a sufficient basis to refuse compliance with an EEOC subpoena.

III.

Accordingly, I would REVERSE the district court's entry of summary judgment and REMAND for further proceedings.

KEITH, Circuit Judge, dissenting. I concur in Judge Milburn's thoughtful dissenting opinion, and write separately only to stress two points of particular concern. First, even if one were to concede that the doctrine of laches could be applied in such a situation, it is inconceivable to me that any court could conclude that the behavior of this defendant would not preclude the exercise of the court's equitable power on its behalf. When, as in the present case, the prevailing party on appeal destroys relevant records despite having received notice of a pending claim, and baldly refuses to comply with an EEOC subpoena while citing spurious grounds for its refusal, it is not only unjustifiable but unconscionable for a court to aid the party's contempt for the administrative process through the granting of equitable relief.

Furthermore, it strikes me as ironic that plaintiff is being penalized for fully exhausting its administrative remedies—pursuant to a complex and comprehensive statutory scheme—rather than resorting to the courts for relief, while this Court, as well as the courts of most other jurisdictions, have been consistently unsympathetic to plaintiffs who seek judicial relief prior to exhaustion even as a reaction to demonstrably lengthy and time-consuming administrative procedures. Indeed, the requirement that one exhaust all administrative remedies has been intoned with such frequency, despite the hardship for plaintiffs which can result, as to have become liturgically axiomatic. Although I am not so naive as to anticipate that this will be the case, I would hope that the delay that the exhaustion requirement creates in some cases would be recognized as prejudicial to future plaintiffs as well as defendants, and that the majority might someday view the shield it provides today as a sword as well.

JONES, Circuit Judge, dissenting. While I wholeheartedly agree with the compelling dissenting opinion of Judge Milburn, I add this separate point of emphasis.

The 1972 Amendments to the Title VII of the 1964 Civil Rights Act "represents in some respects a compromise from the original proposals. However, the final product provides the Equal Employment Opportunities Commission . . . the tools needed to implement an effective enforcement program to secure equal employment opportunity for all our citizens." Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act, Forward (Comm. Print 922).

The legislative history of these amendments makes clear that Congress wanted to be certain that bona fide claims would not be lost on mere technicalities involving filing deadlines or because of a lack of diligence or discernment on the part of the agencies, including the EEOC, designated to enforce the law. Speaking of the 1972 Amendments' changes in the filing time requirements, Senator Harrison Williams, and Senator Jacob Javits, after noting that aggrieved persons are often lay persons, said:

> [W]ide latitude should be given individuals in such cases to avoid any prejudice to their rights as a result of government inadvertence, delay or error.

118 Cong. Rec. 1846 (daily ed. Feb. 14, 1972).

The majority opinion can have the likely effect of forcing into already overcrowded courts complaints initially filed and referred to the agency for conciliation efforts. This is what Congress was seeking to avoid through the compromise. Senator Roman Hruska was particularly concerned at the possibility of employers being required to fend off lawsuits before a number of separate forums. In response, Senators Williams and Javits declared that: "[i]t is hoped that recourse to the

private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of [the] EEOC or the Attorney General, as appropriate. However, as the individual's rights are paramount under provision of Title VII it is necessary that all avenues be left open for quick and effective relief." 118 Cong. Rec. 3462 (daily ed. Mar. 6, 1972).

With these amendments the jurisidiction of Title VII was expanded to embrace complaints of discrimination in federal, state and local government employment as well as gender discrimination. EEOC Act, 42 U.S.C. § 2000e *et seq.* (Supp. II 1972); 42 U.S.C. § 2000e-5 (Supp. II 1972). This expanded jurisdiction opened a floodgate of complaints of discrimination in that the public awareness of the remedy was heightened. This avalanche of cases was piled atop the caseload in 1972 that numbered 16,348, whereas the Commission was able to complete investigation of only 5,090 of them. *See* 188 Cong. Rec. 1650 (daily ed. Feb. 14, 1972). In my view, the majority opinion penalizes victims of discrimination for the pervasiveness of discrimination.

I conclude by noting this deep irony: the aggrieved filed their complaints with the EEOC in a timely manner. By engrafting a laches defense onto the statute this court majority is doing the opposite of what Congress intended. Therefore, I must and do dissent.

EDWARDS, Senior Circuit Judge, concurring specially in Judge Milburn's dissent. In my view of this case the majority opinion simply amends the statute to provide a time limitation not adopted by Congress and not justified in equity. Here defendant Plain Dealer had received notice to "preserve all personnel records relevant to the charge or action until final disposition of the charge or action." Thus the Plain Dealer Publishing Company clearly had notice of the pending claim but in spite thereof proceeded to destroy essential records. Since in this case we sit in equity we should not permit a defendant who refused to produce records voluntarily or comply with an EEOC subpoena to prevail.

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-3140

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLEVELAND NEWSPAPER GUILD—LOCAL 1, NEWSPAPER GUILD, AFL-CIO, CLC; CYNTHIA REECE; C. VICTORIA FLEMING; ALMA KAUFMAN; NANCY BARNHOUSE; JUDITH K. SAMMON, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE PLAIN DEALER PUBLISHING COMPANY,

Defendant-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed March 6, 1987

Before: ENGEL and JONES, Circuit Judges; and EDWARDS, Senior Circuit Judge.

JONES, Circuit Judge, delivered the opinion of the court, in which EDWARDS, Senior Circuit Judge, joined. ENGEL, Circuit Judge (p. 8) delivered a separate dissenting opinion.

JONES, Circuit Judge. The question presented by this case is whether reliance on the Equal Employment Opportunity Commission's ("EEOC") administrative process constitutes inexcusable delay for the purpose of applying the laches doctrine to a Title VII case. We hold that such reliance does not create inexcusable delay and, accordingly, reverse the summary judgment entered in favor of defendant.

On April 12, 1972, the Cleveland Newspaper Guild ("Guild") filed a charge with the EEOC alleging sex discrimination in merit pay, promotions, assignments and other terms and conditions of employment at The Plain Dealer Publishing Company ("Plain Dealer"). On May 8, 1972, defendant was sent a form notice of the charge of employment discrimination. The notice did not name the person or persons bringing the charge. However, it did state that "[s]ection 1602.14 of the Commissions's Regulations requires the preservation of all relevant personnel records until this charge is resolved." Additionally, the notice asked that defendant withhold any questions about the complaint until the investigation commenced. The form stated that when defendant would be contacted in connection with the investigation was uncertain due to the EEOC's "heavy backlog of pending work."

On April 12, 1974, the EEOC sent the Guild a form notice entitled "Charging Party Follow-up." It stated that the EEOC had not been able to process the charge and could not predict when it would begin to do so. Therefore, it asked the Guild to choose one of three possible courses of action: (1) keep the charge open and have it processed when the EEOC could attend to it, (2) sue the Plain Dealer in federal court, or (3) close the charge without further action. In a letter dated September 4, 1974, Jack Weir, then Executive Secretary of the Guild, indicated the Guild's decision to have the EEOC process the charge as soon as possible.

The EEOC's investigation began in May of 1976. On May 19, 1976, counsel for the Plain Dealer was given a copy of

Charge No. 1613 filed by the Guild on April 12, 1972. Thus. the Plain Dealer knew in 1976 who had filed charges and why. On June 22, 1976, the Plain Dealer requested that the EEOC dismiss the charge on the basis that the four year pendency of the charge had impaired its ability to respond. On June 24, 1976, the EEOC notified the Plain Dealer that it would not dismiss the charge, and it requested documents and information regarding Guild employees for the previous six years. The Plain Dealer, on July 8, 1976, refused to submit the requested information voluntarily.

On August 25, 1976, the EEOC issued a subpoena demanding production of the documents previously requested. The Plain Dealer then filed, on September 1, 1976, a petition to revoke and/or modify the subpoena. Over one year later, in September of 1977, the EEOC denied revocation and directed the Plain Dealer to appear at the EEOC for production of the documents. On October 17, 1977, counsel for defendant wrote the EEOC that it would not appear in the offices of the EEOC as ordered. Nothing further occurred in this case until July 30, 1979, when Guild Secretary J. Stephens Hatch wrote to the EEOC concerning the status of the charge. Almost a year later, on June 17, 1980, the EEOC notified defense counsel that the Commission would not seek to enforce the subpoena of August 25, 1976.

On July 3, 1980, the Plain Dealer submitted a position paper in response to the Guild's charge. It stated that, because of the lapse of time, management personnel and documents relevant to the charge were no longer available. On October 10, 1980, the EEOC issued a finding of reasonable cause and thereafter commenced conciliation efforts. These efforts proved fruitless, and on May 21, 1982 the EEOC issued a right to sue notice to the Guild. The Guild then filed the instant suit in the district court on August 18, 1982. The defendant filed a motion for summary judgment based on the affirmative defense of laches, and the district court granted the motion.

To establish an affirmative defense of laches, the defendant has the burden of proof to show both an unexcusable or unreasonable delay by the plaintiff and prejudice to the defendant. *Gardner v. Panama R.R. Co.*, 342 U.S. 29, 31 (1951). In the case before us, the district court held that the delay between the filing of plaintiff's charge in 1972 and the filing of the instant suit in 1982 was inexcusable. "The question whether delay is 'inexcusable' on the facts presented is a conclusion of law over which our review is . . . plenary." *EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 81 (3rd Cir.), *cert. dismissed*, 469 U.S. 925 (1984).

Although one circuit has held that a "plaintiff does not have an absolute right to await termination of EEOC proceedings," *Jeffries v. Chicago Transit Auth.*, 770 F.2d 676, 681 (7th Cir. 1985), *cert. denied*, 469 U.S. 925 (1986), the majority of circuits have held that a plaintiff's "failure to file his Title VII claim until completion of the EEOC process [is] not inexcusable delay and cannot support the application of laches." *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1533 (11th Cir. 1984); *see also Holsey v. Armour & Co.*, 743 F.2d 199, 211 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, 1256-57 (5th Cir. 1979), *adopted*, 619 F.2d 459, 463 (5th Cir. 1980) (en banc), *aff'd on other grounds*, 452 U.S. 89 (1981); *cf. Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983)(failure to secure right to sue letter does not unreasonably delay where plaintiff clearly not "sleeping" on his rights). We believe that the position taken by the majority of the circuits is better reasoned than the position taken by the Seventh Circuit.

As the Supreme Court has noted:

> When Congress first enacted Title VII in 1964 it selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" the goal of equality of employment opportunities. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC

> "would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit."

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977) (citation omitted).

The legislative history of Title VII reflects this preference for the administrative resolution of claims:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate.

118 Cong. Rec. 7565 (1972). Given that Title VII not only provides an administrative mechanism for the resolution of disputes but also *favors* the use of the administrative mechanism, it would defeat Title VII's purpose to penalize plaintiffs for relying on the EEOC's performance of its statutory duties. The provision of remedies other than private legal redress would be pointless if plaintiffs risked their chances of redress by taking advantage of the alternative remedies.

Furthermore, Congress was not unaware of the delays created by the EEOC's administrative process when it reiterated in 1972 its preference for the administrative resolution of claims. In the course of Congress' 1972 expansion of the EEOC's jurisdiction, it was frequently noted that the Commission already had an approximately two year backlog of cases. H. Rep. No. 92-238, 92nd Cong., 2nd Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2137, 2147, 2167, 2170-71. Thus, Congress cannot have intended the EEOC's tardiness in addressing complaints to mandate a plaintiff's abandonment of the administrative process.

Both the district court and the defendant point to the Ninth Circuit's decision in *Boone v. Mechanical Specialties Co.*, 609

F.2d 956 (9th Cir. 1979), to negate the necessary conclusion that plaintiffs may rely on Title VII's administrative remedies without jeopardizing their private legal remedies. However, *Boone* appears to have been a case where rather than relying on an EEOC process which happened to be slow, the plaintiff intentionally *encouraged* delays in the EEOC's culmination of his claim. The plaintiff's responsibility for the EEOC's delay in *Boone* thus made that case the exception to the general rule that laches will not bar a Title VII action. *Id.* at 960 & n.3. Indeed, since its decision in *Boone*, the Ninth Circuit has consistently distinguished *Boone* from the other Title VII laches cases that have come before it. *See Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9th Cir. 1985)("EEOC delays are not to be charged against private plaintiffs and . . . complainants are not required to terminate the administrative process by requesting a notice of right-to-sue"); *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149, 1152 (9th Cir. 1982) (ordinarily, private party not charged with EEOC's delay when it retains control over a charge); *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 667 n.8 (9th Cir. 1980) (no presumption that EEOC's delay in issuing right to sue letter is plaintiff's fault).

Since we hold that the Guild's reliance on the EEOC's administrative process did not constitute inexcusable delay, we need go no further in order to reverse the district court's finding that the claim was barred by laches. However, we note that defendant's affirmative defense of laches is also barred by the "clean hands" doctrine. Because laches is an equitable defense, this circuit has held that it can be asserted only by a party who comes into equity with clean hands. *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). As several courts of appeals have noted, "because a defendant must have notice of pending EEOC action, prejudice is often minimal despite a significant delay before court action is initiated." *Bratton*, 649 F.2d at 667 n.8. *See also Howard*, 726 F.2d at 1533. The Plain Dealer knew in 1972 that a discrimination charge had been filed with

the EEOC and that personnel records should be saved. Four years later, the Plain Dealer was given a copy of the charge, and so knew exactly what records and witnesses would be relevant. But the Plain Dealer refused in 1976 and in the following years to cooperate with the EEOC, even when its records were subpoenaed. Thus, the loss of evidence and the delays in this case were substantially created by the Plain Dealer's lack of cooperation with the EEOC process. While the Plain Dealer may have the right to refuse to cooperate with this process, it cannot then fault the Guild for the delays caused by its own stonewalling.

Accordingly, we REVERSE the district court's grant of summary judgment to the defendant.

ENGEL, Circuit Judge, dissenting. For the reasons stated by United States District Judge Thomas Lambros filed in the district court on January 10, 1986, I must respectfully dissent. I specifically agree with Judge Lambros that in a proper case the doctrine of laches can apply in proceedings such as this, although certainly it should be sparingly used because of the congressional policy favoring resort to the administrative mechanisms in Title VII before commencement of suit. The circumstances here, however, are such that I must agree that not only was the delay inexcusable, but that very little positive good can come from the revival of a case which has been essentially dormant for more than 14 years. It must be remembered that the nature of the charges was withheld from The Plain Dealer for four years at the outset. Further, as I understand the record, the persons originally filing the charge with the EEOC are themselves no longer able to remember precisely the nature of the specific complaint. Given the fact that there undoubtedly has been a great turnover in personnel, and that over the years management and employees generally have gained new insights in the area of sex discrimination, I can only conclude that the revival at this date of these outmoded charges is designed more to achieve some tactical advantage than to advance the legitimate objects of the act. In addition, I understand that the Newspaper Guild had joint committees with The Plain Dealer during this entire period for the purpose of handling problems of sex discrimination, and it does not appear that any repair was ever had to this informal mechanism, which might have been useful had genuine problems arisen.

In my view, it would be much better to let the parties commence afresh if any problems of sex discrimination remain in the operation of the company. To try to reconstruct an uncertain and unremembered past record would only add useless baggage which would impede the progress toward the solution of any legitimate claims and increase the administrative costs to both the Guild and the Newspaper.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE CLEVELAND NEWSPAPER GUILD, LOCAL 1, et al.,	)	
Plaintiffs	)	No. C 82-2128
v.	)	MEMORANDUM OPINION AND ORDER
THE PLAIN DEALER PUBLISHING COMPANY,	)	
Defendant	)	

LAMBROS, DISTRICT JUDGE

This is a class action, sex discrimination claim brought pursuant to Title VII, 42 U.S.C. §2000(e), et seq. Defendant has filed a motion for summary judgment based on the defense of laches.

The facts in this case are relatively uncontested and reveal a chronology of events that is central to the consideration of the laches defense. On April 12, 1972 the Guild filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimi-

nation in merit pay, promotions assignments and other terms and conditions of employment at The Plain Dealer. Defendant was then sent on May 8, 1972 a form notice of the charge of employment discrimination. The notice did not name the person or persons bringing the charge. However it did state "[s]ection 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this change is resolved." Additionally, the notice asked that defendant withhold any questions about the complaint until the investigation commenced. The form stated that when defendant would be contacted in connection with the investigation was uncertain due to their "heavy backlog of pending work."

On April 12, 1974 the EEOC sent the Guild a form notice entitled "Charging Party Follow-Up." It stated that the

EEOC had not been able to process the charge and could not predict when it would begin. Therefore it asked the Guild to chose one of three possible courses of action: keep the charge open and have it processed when the EEOC could attend to it, or, the Guild could sue the Plain Dealer in Federal Court, or, it could choose to close the charge without further action. In a letter dated September 4, 1974, Jack Weir, then Executive Secretary of the Guild, indicated the Guild's decision to have the EEOC process the charge as soon as possible.

The EEOC's investigation did not begin until May of 1976. On May 19, 1976 counsel for the Plain Dealer was first given a copy of Charge No. 1613 filed by the Guild on April 12, 1972. On June 22, 1976 the Plain Dealer requested that the EEOC dismiss the charge on the basis that the four year pendency of the charge had

impaired their ability to respond. On June 24, 1976, the EEOC notified the Plain Dealer that it would not dismiss the charge and requested documents and information regarding Guild employees for the previous six (6) years years [sic]. The Plain Dealer responded on July 8, 1976 that it would not voluntarily submit the information requested.

On August 25, 1976 the EEOC issued a subpoena demanding production of the documents previously requested. The Plain Dealer then filed on September 1, 1976 a petition to revoke and/or modify the subpoena. Over a year later, in September of 1977 the EEOC denied revocation and directed the Plain Dealer to appear at the EEOC for production of the documents. On October 17, 1977 counsel for defendant wrote the EEOC that it would not appear in the offices of the EEOC as ordered. Nothing further

occurred in this case until July 30, 1979 when Guild Secretary J. Stephens [sic] Hatch wrote to the EEOC as to the status of the charge. Almost a full year later, on June 17, 1980, the EEOC notified defense counsel that the Commission would not seek to enforce the subpoena of August 25, 1976.

On July 3, 1980, the Plain Dealer submitted a position paper in response to the Guild's charge. It stated that because of the lapse in time, management personnel and documents relevant to the charge were no longer available. The next event occurred on October 10, 1980, when the EEOC issued a finding of reasonable cause and thereafter commenced conciliation efforts. These efforts proved fruitless, and, on May 21, 1982 the EEOC issued a notice to the Guild of its right to sue. The Guild then filed the instant suit on August 18, 1982.

Laches may be properly used as a defense to a Title VII action. Boone v. Mechanical Specialities, 609 F.2d 956 (9th Cir. 1979); Pande v. Johns Hopkins University, 598 F. Supp. 1804 (D. Md. 1984). Specifically, laches refers to an equitable time limitation on a party's right to bring suit. "The doctrine bars an action where a party's unexcused or unreasonable delay has prejudiced his adversary." Boone, at 958 (9th Cir. 1979). The burden of establishing these two elements is on the defendant. EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 80 (3rd Cir. 1984). "On summary judgment, the movant's affidavits must establish a prima facie defense of laches." Id. at 81. Moreover, length of delay and other matters of historical circumstance are questions of fact. Id. As the pleadings and affidavits submitted by the parties in this case

present no material issues of disputed fact in regard to the relevant events of historical circumstance, the focus of analysis must necessarily be on whether the delay was inexcusable as a matter of law.

The delay in this case falls within one broad time parameter, i.e. from the time the charge was filed April 12, 1972 until suit was filed in this Court, August 18, 1982, a time period in excess of ten (10) years. Although there is support for the proposition that reliance on the EEOC's administrative process before initiating a private suit is not inexcusable delay, Hosley v. Armour & Co., 743 F.2d 199, 211 (4th Cir. 1984), citing Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1980), that proposition is not controlling in this case. Rather, as in the case of Boone v. Mechanical Specialities, 609 F.2d 9596 [sic], 959

(9th Cir. 1979), the Guild has not presented a sufficient explanation for the ten (10) year delay in bringing suit.

The affidavits submitted by the Guild simply do not account for the extended duration of the charge. The Guild is a labor union with specific knowledge and responsibility in equal employment opportunity matters, retains legal counsel and has an abiding interest on global, national and local levels in the area of gender discrimination. Its course of continued inaction and disinterest cannot, therefore, be written off to ignorance of legal rights. Clearly, the Guild knew of its ability to obtain a right-to-sue letter and institute civil action. In fact, in April of 1974, the Guild was specifically informed of this option and instead chose to leave the charge pending with the EEOC. While this choice by itself cannot be condemned, it

is the continued omission to obtain a right-to-sue letter for the next eight (8) years that is inexcusable. The records of Guild contacts and oversight of the EEOC's handling of the charge is remarkably sparse. The only inquiry made of the EEOC is the one-line inquiry of July 30, 1979 by Guild Secretary J. Stephen Hatch.

The Guild's claim of good faith reliance on the EEOC's handling of the charge and investigation has no evidentiary support nor has the plaintiff supplied any affidavits in this regard. There is no evidence of attendant investigative complexity or difficulty which might explain the lapse of time. It is also significant that there is no evidence of the time and efforts involved in the accumulation of information, analysis of data and drafting of the reasonable cause determination. These

three showings by the EEOC in EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69, 83 (3rd Cir. 1984), helped the court in determining that inexcusable delay was not present as a matter of law. In contrast, the case under consideration reveals some minimal efforts by the EEOC to discover information relevant to the charge. The EEOC resorted to its subpoena powers in 1976 but later dropped enforcement of the subpoena four years later. The October 10, 1980 reasonable case determination, which is not in evidence in this case, appears to have been relatively non-detailed and certainly was not a product of eight years of EEOC effort in the matter. (¶13, Wilharm affidavit). Finally, serious conciliation efforts are not in evidence in this case.

Consequently, the holding is compelled that inexcusable delay is sus-

tained in this case as a matter of law. See EEOC v. Superior Tool and Tire Company, No. C 81-1435 (N.D. Ohio 1983) (Aldrich, J.).

The second element of the laches defense involves a showing of prejudice. "Classic elements of undue prejudice include unavailability of witnesses, changed personnel, and the loss of pertinent records." EEOC v. Dresser Industries, Inc., 668 F.2d 1199, 1203 (11th Cir. 1982) citing EEOC v. Massey-Ferguson, Inc., 622 F.2d 271 (7th Cir. 1980); EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1978). The esential [sic] prejudice claims relied on by defendant are the unavailability of defense witnesses, faded memories, unretained records and destroyed records. Affidavits are submitted in support of this contention. The Plain Dealer has shown that most of the

witnesses are no longer available and that many of the key employees would not be able to testify at trial. In a factually aligned case, the Court held that a similarly situtated [sic] defendant should not be held responsible for the intervening deaths, retirements, and terminations which normally occur with the passage of time. See Boone v. Mechanical Specialities, Co., 609 F.2d 956, 959 (9th Cir. 1979).

Furthermore, there is case law support for the proposition that relocation of key witnesses, destruction of documentary evidence and erosion of witness' memories are sufficient to comprise substantial prejudice. Pande v. Johns Hopkins University, 598 F. Supp. 1084, 1088-89 (D. Md. 1984).

Plaintiff cites the fact that the May 8, 1972 EEOC notice given to the Plain Dealer stated that the Plain Dealer

was to preserve all relevant personnel records. Nevertheless, the Plain Dealer was an employer of over 2000 employees in 1972. Such an ambiguous form that failed to state what employees or even what department was the subject of the charge, coupled with the fact that the Guild never voluntarily provided such information, serves to negate the force of the EEOC command to preserve all relevant records. It was not until 1976, a full four years after the charge was filed, that the Plain Dealer learned of the particulars of the charge. In the intervening years, it cannot be doubted that personnel and documentary evidence had dissipated, notwithstanding the fact that it was another six years passed before suit was finally brought.

Even if defendant could locate its witnesses and find some of its records, it would be inequitable to impose on

defendant the expense of bringing the witnesses and evidence to trial. See Alexander v. Elgin, Joliet & Eastern Railway Co., No. 81 C 307 (N.D. Ill. 1981) (McGarn, J.).

The delay in bring suit for alleged sex discrimination under 42 U.S.C. §2000(e) et seq. is inexcusable. Material and undue prejudice has accrued to defendant as a result of plaintiff's dilatory conduct in this suit. These findings are clearly supported by the evidence submitted by the parties in support of their respective Rule 56 assertions. In addition, as there exist no genuine issues of material fact and defendant has shown it is entitled to a judgment as a matter of law, defendant's motion for summary judgment is hereby granted. This action is dismissed and terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
United States
District Judge

DATED: 1/10/86

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE CLEVELAND NEWSPAPER GUILD, LOCAL 1, et al.,	)	
Plaintiffs	)	No. C 82-2128
v.	)	MEMORANDUM OPINION AND ORDER
THE PLAIN DEALER PUBLISHING COMPANY,	)	
Defendant	)	

LAMBROS, DISTRICT JUDGE

In accordance with the memorandum opinion an order of this date in the above-captioned case, defendant's motion for summary judgment is hereby granted. Judgment is entered in defendant's favor and this action is dismissed.

This action is terminated.

IT IS SO ORDERED.

/s/ Thomas D. Lambros
Thomas D. Lambros
Unites States
District Judge

DATED: 1/10/86

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-3140

THE CLEVELAND NEWSPAPER GUILD, LOCAL 1, et al.,

Plaintiffs-Appellants,

v.

THE PLAIN DEALER PUBLISHING COMPANY,

Defendant-Appellee.

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges; and and EDWARDS, Senior Circuit Judge

J U D G M E N T

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court

that the judgment of the said district court in this case be and the same is hereby affirmed.

IT IS FURTHER ORDERED that Defendant-Appellee recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said district court, if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ John P. Hehman / saf
Clerk

A True Copy

Attest:

/s/ Gary McCarthy
Deputy Clerk

Issued as Mandate:

COSTS:

Filing fee.....$
Printing.....$

Total.....$

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Whenever a charge is filed by or on behalf a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management

committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission

determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under

subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice, shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such

charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the

case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of

this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in

such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

(g) If the court finds that the respondent has intentionally engaged in

or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the pack pay otherwise allowable. No order of the court shall require the

admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * *

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

* * *

42 U.S.C. § 2000e-8

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

* * *

(c) Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for

such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in

the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of

this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

* * *

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the date of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial

is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if praticable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge,

shall set forth such facts as would be admissible ~~in~~ evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interro~~gato~~ries, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur,

including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[37 FR 9219, May 6, 1972, as amended at 46 FR 63266, Dec. 31, 1981]

§ 1602.14 Preservation of records made or kept.

(a) Any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of 6 months from the date of the making of the records or the personnel action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a

period of 6 months from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. The date of "final disposition of the charge or the action" means the date of expira-

tion of the statutory period within which the aggrieved person may bring an action in a U.S. District Court or, where an action is brought against an employer either by the aggrieved person, the Commission, or by the Attorney General, the date on which such litigation is terminated.

(b) The requirements of this section shall not apply to application forms and other preemployment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

§ 1602.14

[F.R. Doc. 66-1694 -
Filed Feb. 16, 1966]

§ 1602.14 Preservation of records made or kept

(a) Unless the employer is subject to a State or local fair employment practice law or regulation governing the preservation of records and containing requirements inconsistent with those stated in this part, any personnel or employment record made or kept by an employer (including but not necessarily limited to application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of 6 months from the date of the making of the records or the personnel

action involved, whichever occurs later. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of 6 months from the date of termination. Where a charge of discrimination has been filed, or an action brought by the Attorney General, against an employer under Title VII, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action. The term "personnel records relevant to the charge," for example, would include personnel or employment records relating to the charging party and to all other employees holding positions similar to that held or sought by the charging party; and applications forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that

for which the charging party applied and was rejected. The date of "final disposition of the charge or the action" means the date of expiration of the statutory period within which a charging party may bring an action in a U.S. District Court or, where an action is brought against an employer either by a charging party or by the Attorney General, the date on which such ligitation is terminated.

(b) The requirements of this section shall not apply to application forms and other pre-employment records of applicants for positions known to applicants to be of a temporary or seasonal nature.

RETURN ADDRESS

1365 Ontario
Cleveland, Ohio 44114

IMPORTANT
See Notice of Non-retaliation on reverse.

MAILING ADDRESS

CHIEF EXECUTIVE OFFICER
The CLEVELAND PLAIN DEALER
1801 Superior Ave
Cleveland, Ohio 44114

FUTURE CORRESPONDENCE WILL REFER TO CHARGE NO.

TCL2-1613

DATE OF VIOLATION

CONTINUING

PLACE OF VIOLATION

CLEVELAND OHIO

NOTICE OF CHARGE OF EMPLOYMENT DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in writing it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of all relevant personnel records until this charge is resolved.

We will investigate this charge as soon as possible. However, our heavy backlog of pending work makes it impossible to predict when we will contact you again. We hope that you will hold any questions about this specific complaint in abeyance until we are able to begin the investigation.

BASIS OF DISCRIMINATION → ☐ Race or color ☒ Sex ☐ Religion ☐ National Origin

NATURE OF CHARGE

	Hiring		Job classification		Benefits
	Discharge		Training/apprenticeship		Segregated facilities
	Layoff		Exclusion		Intimidation/reprisal
	Recall		Union representation		Reprisal (U.S.C. 704(a) only)
X	Wages		Segregated locals	X	Terms and conditions
	Promotion		Referral		Unspecified and other
	Demotion		Qualification/testing		OTHER (Specify)
	Seniority		Advertising		

I hereby certify that I mailed the original of this Notice to the addressee hereinabove.

DATE 8 MAY 1972

EEOC EMPLOYEE (Signature)

EEOC FORM 131 MAR 72

FILE COPY

EXCERPT FROM EEOC NOTICE OF CHARGE OF DISCRIMINATION

You are hereby notified that a charge of employment discrimination under Sec. 706 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein. The Act does not contemplate that the name of the person bringing the charge be made available to you.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations requires the preservation of

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